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JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,623

TYLER GAS SERVICE COMPANY AND CITY OF TYLER, TEXAS,
Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*
UNITED GAS PIPE LINE COMPANY, *Intervenor*

On Petition for Review of Order of the Federal Power Commission

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United States Court of Appeals
For the
District of Columbia Circuit

FILED
MAY 24 1957

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v.

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On Petition for Review of Order of the Federal Power Commission

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JOINT APPENDIX

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(1)

Record Page 1

DEFENDANT'S EXHIBIT NO. 8.

May 29, 1952

Reference F.P.C. Rate Schedule No. 42.

United Gas Pipe Line Company.

This statement is made pursuant to Section 154.85 of Federal Power Commission Rules and Regulations with reference to the existing Gas Sales Agreement between United Gas Pipe Line Company and Tyler Gas Service Company, or their predecessors in title dated November 22, 1940, as amended and supplemented.

This Contract, as amended and supplemented, continues in effect as an executed Service Agreement for service to the extent that the provisions thereof are not superseded by or inconsistent with the applicable provisions of the Rate Schedules and General Terms and Conditions of United Gas Pipe Line Company's Federal Power Commission Gas Tariff.

The following provisions of said Contract, and amendments and supplements thereto (herein identified by F.P.C. Supplement Number to the above numbered Rate Schedule) remain in effect and have not been superseded by said Gas Tariff:

	Part Retained
Preamble	All
Article I	All
Article II, as amended by Supplement No. 3	All of Article II and paragraph numbered "1" of Supplement No. 3
Article III	All
Article VI	All
Article X	All

	Part Retained
Article XIV	All
Article XV	Last paragraph
Article XVI	1st sentence except words "check meters"
Article XVII	All
Article XX	All
Article XXI	All
Article XXIII	All
Testimonium Clause and Signatures	All
Supplements:	
Supplement No. 3	Paragraph numbered "4"

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United Gas Pipe Line Company
Rate Schedule FPC No. 42
Effective date: Nov. 5, 1940
Filing date: Jan. 3, 1941
(Supersedes Rate Schedule FPC No. 1 and supplements thereto)

THIS AGREEMENT, made and entered into as of the 22 day of November, 1940, by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation having a permit to do business in the State of Texas (hereinafter called "Seller") and TYLER GAS SERVICE COMPANY, a Texas corporation (hereinafter called "Buyer"),

WITNESSETH:

WHEREAS, Buyer owns and operates a gas distribution system in the City of Tyler, Texas, and in its adjoining environs, and desires to purchase from Seller gas for resale and distribution through said distribution system

as now constructed and as may be hereafter enlarged and extended, and for such other purposes as are hereinafter specified; and,

WHEREAS, Seller has a supply of gas available for delivery to Buyer and is willing to sell and deliver to Buyer such gas for resale and distribution, as hereinafter provided,

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter set forth to be kept and performed by the parties hereto, it is agreed by and between said parties as follows:

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I.

Subject to the terms and conditions hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for (á) all gas necessary to meet Buyer's requirements of gas for resale and distribution through its said distribution system and any extensions thereof, (b) all gas consumed by Buyer in connection with the operation of said distribution system and facilities, and (c) all gas lost and unaccounted for after delivery to Buyer hereunder.

II.

The gas to be sold and delivered by Seller to Buyer under this agreement shall be delivered to Buyer at the metering station where Buyer's distribution system connects to the pipe line of Seller, said point of delivery being at or near the city limits of the City of Tyler, Texas.

III.

The gas to be sold and delivered by Seller to Buyer hereunder shall be delivered at said point of delivery at

such pressures (not to exceed sixty (60) pounds per square inch gauge pressure) as may be necessary to meet Buyer's requirements and as can be maintained without more than one stage of

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regulation by Seller; and Buyer agrees to receive and take gas hereunder at the pressures in this section IH specified and thereafter to regulate and control said gas for delivery to its consumers.

* * * * * * * * * * *

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VI.

This agreement shall be for a term beginning November 5, 1940, and ending July 25, 1962.

* * * * * * * * * * *

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X.

Buyer may enter into certain contracts for the sale of gas which provide for correction of price on account of excess or deficiency in B.T.U. content of the gas delivered and, as to the gas delivered under all such contracts which are already in force, Seller agrees to furnish Buyer periodic-

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ally, when necessary, information showing the B.T.U. content of such gas so as to enable Buyer to fulfill the provisions of its said contracts with reference thereto and to take full advantage of the price adjustments provided for.

* * * * * * * * * * *

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XIV.

If either party shall fail to perform any of the covenants or obligations imposed upon it under and by virtue of

this contract (except where such failure shall be excused under any of the provisions of this contract), then in such event the other party may at its option terminate this contract by proceeding as follows: The party not in default shall cause a written notice to be served on the party in default, stating specifically the cause for terminating this contract and declaring it to be the intention of the party giving the notice to terminate the same; thereupon, the party in default shall have thirty (30) days after the service of the aforesaid notice in which to remedy or remove the cause or causes stated in the notice for terminating the contract, and if within said period of thirty (30) days the party in default does so remove or remedy said cause or causes and fully indemnify the party not in default for any and all consequences of such breach, then such notice shall be ineffective and this agreement shall continue in full force and effect. In case the party in default, within said period of thirty (30) days, does not so remedy and remove the cause or causes or does not indemnify the party giving the notice for any and all consequences of such breach then this agreement shall become null and void from and after the expiration of said period. Any cancellation of this agreement pursuant to the provisions of this section XIV shall be without prejudice to the right of the

party not in default to collect any amounts then due it and without waiver of any other remedy to which the party not in default may be entitled for violation of this contract.

XV.

Buyer specifically recognizes the fact that Seller delivers gas to (a) gas utilities other than Buyer for resale to

domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its customers, including Buyer, then it is mutually agreed that the gas requirements of gas utilities (including Buyer) selling gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities for resale to domestic consumers then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their

requirements from Seller or from gas utilities (including Buyer) purchasing their requirements from Seller; and if Seller does not have sufficient gas to supply all of the requirements of said power plants, then said requirements shall be supplied ratably. After the above gas requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, including Buyer and other gas utilities to the extent of gas sold by them to their other customers. In the event of any shortage of gas as in this section XV provided, Buyer agrees that it will discontinue service of gas to its industrial consumers during the period of any such shortage, to the extent which may be necessary consistent with the provisions hereof.

Seller may, without liability to Buyer, interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and compressor station equipment and machinery, but only for such time as may be reasonable or unavoidable; and Seller shall give to Buyer, except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruptions so as to inconvenience Buyer and the other consumers of Seller as little as possible. Seller shall also give to Buyer

reasonable notice before resuming service after the same has been interrupted and agrees that it will not resume service hereunder until after having given Buyer reasonable time after notice within which to have a representative present when gas is again turned into Buyer's lines.

In the event that Seller for any reason shall fail to provide and furnish to Buyer a supply of gas adequate for the demand of the domestic consumers of Buyer for a continuous period of thirty days then Buyer, at its election, may manufacture gas or procure a supply of gas from another source, and if such failure shall continue for a continuous period of ninety days, then in such case Buyer shall have the right, at its election, to cancel this agreement by giving Seller thirty days notice in writing prior to the date specified in said notice for cancellation.

XVI.

To the extent that Seller has the right to do so, Seller hereby gives and grants to Buyer the right to install, maintain and operate upon the property, rights of way and easements of Seller, the meters, regulators and service lines owned and used by Buyer in making sales of gas

purchased from Seller hereunder; and where Seller has installed or hereafter installs city gate delivery stations Buyer shall have the right to install, maintain and operate its pressure regulators, and odorizing equipment therein. Buyer shall also have the right of ingress to and egress from any such property, rights of way and easements of the Seller for

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the purpose of installing, operating and maintaining its property and equipment thereon and removing the same therefrom.

XVII.

Any notice hereunder shall be deemed to be fully given if in writing, and (a) mailed by postpaid registered mail, addressed to the party to whom such notice is to be given at the addresses stated below, or at such other address as shall be hereafter designated in writing or (b) delivered at the office of the party to whom such notice is to be given, at such address:

United Gas Pipe Line Company
United Gas Building
Shreveport, Louisiana

Tyler Gas Service Company
Tyler, Texas.

* * * * * * * * * *

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XX.

If Buyer's gas distribution system used for the distribution and sale of gas purchased from Seller hereunder is voluntarily sold or exchanged by Buyer, then, and in such event, Buyer agrees that it will cause the person, firm or corporation so acquiring such distribution system

to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the distribution system so sold or exchanged, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller, and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees

that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the property so sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

XXI.

It is understood and agreed that all contracts now in effect between Seller and Buyer relating to the sale and delivery of gas to Buyer for the requirements of its distribution system shall, effective the fifth (5th) day of November, 1940, at seven (7) o'clock, A. M., be cancelled and superseded in all of their terms and conditions by this agreement and both of the parties hereto shall be released from any and all liabilities and obligations under such contracts, except as to the obligation of Buyer to pay for all gas theretofore delivered to Buyer by Seller

and for which payment has not been made, and this agreement shall, effective the fifth (5th) day of November, 1940, at seven (7) o'clock, A. M., constitute the sole agreement between the parties

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hereto covering the sale by Seller and the purchase by Buyer of gas for the requirements of Buyer's gas distribution system hereinabove mentioned.

* * * * * * * * * *

XXIII.

This agreement shall be binding upon and inure to the benefit of the successors and assigns of each of the parties hereto.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their proper officers thereunto duly authorized, as of the date first hereinabove written.

United Gas Pipe Line Company
By M. A. Abernathy
Vice President

Attest:

J. H. Miracle
Secretary

(Seal)

Tyler Gas Service Company
By E. Chandler Busch

Attest:

H. J. Campbell
Secretary

(Seal)

* * * * * * * * * *

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Excerpts from Rate Schedule FPC No. 42

4. Notwithstanding anything contained in said contract, as heretofore supplemented and amended, and as amended hereby, Seller shall never be required to deliver gas to Buyer at said second delivery point in excess of the capacity of Seller's 2½" tap line to which Buyer shall make its connection, as above provided.

* * * * * * * * * *

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Supplement No. 4

UNITED GAS PIPE LINE COMPANY
Effective Date: May 10, 1946
Filing Date: August 5, 1946
to
Rate Schedule FPC No. 42
(Supersedes Supp. No. 2 to FPC No. 42)

THIS AGREEMENT made and entered into this 29th day of May, 1946 by and between UNITED GAS PIPE LINE COMPANY, a Delaware corporation, hereinafter called Seller, and TYLER GAS SERVICE COMPANY, a Texas corporation, hereinafter called Buyer,

WITNESSETH:

WHEREAS, a certain contract dated November 22, 1940 was entered into by and between Seller and Buyer, relating to the sale and purchase of gas for resale and distribution in the City of Tyler, Texas, and in its adjoining environs, which said contract has been heretofore amended, and to which contract, as amended, reference is hereby made for all purposes, and

WHEREAS, Seller and Buyer desire to further amend said contract of November 22, 1940, as heretofore amended, as hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto do mutually agree as follows:

1

From and after the effective date hereof, Article VII of said contract of November 22, 1940, as heretofore amended, shall be and is hereby further amended so that said Article shall, in its entirety, thereafter read as follows:

"VII

"The price to be paid by Buyer to Seller for each one thou-

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sand (1,000) cubic feet of gas sold and delivered to Buyer hereunder shall be as follows:

A. For all gas delivered by Seller to Buyer for resale and distribution to Buyer's domestic consumers, twelve cents (12¢) per thousand (1,000) cubic feet.

The amount of domestic gas delivered hereunder during any month (being the gas to which the above mentioned rate is applicable) shall be the total volume of gas billed for such month by Buyer to its residential consumers plus the total volume of gas billed for such month by Buyer to its commercial and other consumers whose individual average rate from Buyer for such month is fifteen cents (15¢) or more per thousand (1,000) cubic feet.

B. For all gas delivered by Seller to Buyer for resale to industrial consumers, eighty per cent (80%)

of the proceeds received or receivable by Buyer therefor from each such industrial consumer, without deduction for unpaid accounts; provided, however, that Seller shall receive not less than twelve cents (12¢) per thousand (1,000) cubic feet for each thousand (1,000) cubic feet of such gas, except in such cases, if any, as Seller may consent in writing to a lesser amount.

All gas sold by Buyer to its consumers, except domestic gas as defined above, shall be classified as industrial gas to which the rate provided in this subdivision B shall apply.

C. For all gas used by Buyer or delivered by Buyer and for which no billing will be rendered by Buyer, the prices to be paid by Buyer to Seller shall be as follows:

(a) For gas so used or delivered for residential or commercial purposes, the price shall be twelve cents per thousand (1,000) cubic feet;

(b) For gas so used or delivered for any purposes other than the purposes set forth in paragraph (a) of this subdivision C, the weighted average rate charged Buyer by Seller for industrial gas delivered hereunder during the month for which settlement is made.

D. For unaccounted-for gas (computed as provided in section VIII hereof), the prices to be paid by Buyer to Seller shall be as follows:

(a) For unaccounted-for gas allocated to deliveries of domestic gas as provided in section VIII hereof, twelve cents (12¢) per thousand (1,000) cubic feet.

(b) For unaccounted-for gas allocated to deliveries of industrial gas as provided in section VIII hereof, the weighted average rate charged Buyer by Seller for industrial gas delivered hereunder during the month for which settlement is made.

(c) For unaccounted-for gas allocated (as provided in section VIII hereof) to the gas used by Buyer for residential and commercial purposes and to the gas delivered by Buyer for residential and commercial purposes and for which no billing will be rendered by Buyer, twelve cents (12¢) per thousand (1,000) cubic feet; and for unaccounted-for gas allocated to the gas used by Buyer for any other purpose and to the gas delivered by Buyer for any other purpose and for which no billing will be rendered by Buyer, the weighted average rate charged Buyer by Seller for industrial gas delivered hereunder during the month for which settlement is made.

The prices set forth above are based upon taxes as are in effect on May 10, 1946 in so far as they affect Seller's cost directly or indirectly. In the event such taxes are thereafter increased, an adjustment will be made in the above prices in the manner and to the extent hereinafter provided.

The term "tax" as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value, or sales price of the gas in question; provided, however,

that the term "tax" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

To the extent that the weighted average amount of all such taxes lawfully required to be paid by Seller with respect to any one thousand (1,000) cubic feet of gas delivered hereunder during any month after

(420)

May 10, 1946, shall exceed the weighted average amount of all such taxes required to be paid by Seller with respect to each one thousand (1,000) cubic feet of gas on May 10, 1946, the price per one thousand (1,000) cubic feet of gas delivered hereunder during the month in question shall be increased by an amount equal to 100% of such excess.

For the purpose of determining the above mentioned tax adjustment, any tax paid by any subsidiary or affiliate of Seller and any tax which Seller under contractual obligation refunds to the person or company paying same shall be considered to have been paid by Seller."

2

This agreement shall be and is hereby made effective as of May 10, 1946 as fully and completely to all intents and purposes as if this instrument had been executed on said date.

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3

Except as herein specifically changed and amended, said agreement of November 22, 1940, as heretofore amended, shall remain the same and continue in full force and effect as written.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their respective corporate officers thereunto duly authorized and their respective corporate seals thereunto affixed, in two counterparts, each

of which shall constitute an original, on the day and year first above written.

UNITED GAS PIPE LINE COMPANY
By R. H. HARGROVE
Vice President

Attest:

J. H. MIRACLE
Secretary

TYLER GAS SERVICE COMPANY
By E. CHANDLER BUSCH

Attest:

H. J. CAMPBELL
Secretary

(SEAL)

42

Supplement No. 5

UNITED GAS PIPE LINE COMPANY
Effective Date: May 10, 1946
Filing Date: August 5, 1946
to
Rate Schedule FPC No. 42
(Supersedes Supp. No. 1 to FPC No. 42)

UNITED GAS PIPE LINE COMPANY
Shreveport 92 Louisiana

May 21, 1946

Tyler Gas Service Company
Tyler, Texas

Gentlemen:

We have received your letter of May 15, 1946 requesting that we consent, under the provisions of Subdivision B of Article VII of that certain contract dated November 22,

1940, as amended, relating to the sale by us and purchase by you of gas for resale and distribution in the City of Tyler, Texas, to receive as our due and proportionate part thereof, eighty (80%) per cent of the proceeds of all gas delivered by us to you for resale by you to industrial consumers under the following Industrial Rate Schedule:

"INDUSTRIAL SERVICE

"Monthly Rate								Maximum Billing
14¢ per MCF	for	deliveries	between		,000	and	500,000 Cu. Ft.	$ 65.13
13¢ "	"	"	"	"	501,000	"	1,000,000 "	120.12
12¢ "	"	"	"	"	1,001,000	"	5,000,000 "	500.10
10¢ "	"	"	"	"	5,001,000	"	10,000,000 "	900.09
9¢ "	"	"	"	"	10,001,000	"	20,000,000 "	1,600.08
8¢ "	"	"	"	exceeding	20,001,000"			

; provided that in no event shall we receive less than seven and two tenths (7.2¢) cents per thousand (1,000) cubic feet for all of such gas delivered to you by us for resale to industrial consumers.

We hereby consent, subject to the terms and provisions hereof, that you shall pay to us and we shall accept eighty (80%) per cent of the proceeds received or receivable by you from each industrial consumer, without deduction for unpaid accounts, even though eighty (80%) of such proceeds may amount to less than the minimum price set forth in said Subdivision B, for all gas delivered by us to you under the above mentioned contract, as amended, from and after May 10, 1946, and resold by you to industrial consumers under your above set out Industrial Rate Schedule, provided, however, that we shall receive not less than seven and two tenths (7.2¢) cents per thousand cubic feet for each thousand cubic feet of gas delivered by us to you for resale to each industrial consumer under said Industrial Rate Schedule plus an amount equivalent to the tax adjustment hereinafter provided for.

It is agreed that in computing the amounts received or

receivable by you from each such industrial consumer under said Industrial Rate Schedule there shall be included all minimum charges and any other charges made by you under said Rate Schedule.

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The prices herein provided to be paid to us for gas delivered by us to you and sold by you to industrial consumers under said Industrial Rate Schedule are based on taxes as are in effect on May 10, 1946 in so far as they affect our cost directly or indirectly. In the event such taxes are thereafter increased, an adjustment will be made in said prices in the manner and to the extent hereinafter provided.

The term "tax" as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value, or sales price of the gas in question; provided, however, that the term "tax" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation.

To the extent that the weighted average amount of all such taxes lawfully required to be paid by us, with respect to any one thousand (1,000) cubic feet of gas delivered hereunder during any month after May 10, 1946, shall exceed the weighted average amount of all such taxes required to be paid by us with respect to each one thousand (1,000) cubic feet of gas on May 10, 1946, the price per one thousand (1,000) cubic feet of gas delivered hereunder

during the month in question shall be increased by an amount equal to 100% of such excess.

For the purpose of determining the above mentioned tax adjustment, any tax paid by any subsidiary or affiliate of ours and any tax which we under contractual obligation refund to the person or company paying same shall be considered to have been paid by us.

It is understood and agreed that this letter of consent shall at all times conform to the provisions of Subdivision B of Article VII of said above mentioned contract, as amended, and any changes made in said Subdivision will affect this instrument in a like manner.

We further agree, in accordance with the request in your said letter of May 15, that in the event you shall hereafter request that we give you a similar letter of consent based upon an Industrial Rate Schedule for gas to be sold by you to industrial consumers not now being served by you, which Rate Schedule contains rates lower than the minimum rate set forth in the above Industrial Rate Schedule, and we refuse to execute such letter of consent, then you shall have the right to purchase gas from other sources for resale by you to such new industrial consumers.

Except to the extent herein specifically changed and modified,

the above mentioned contract of November 22, 1940, as amended, shall remain the same.

Yours very truly,

UNITED GAS PIPE LINE COMPANY
By R. H. HARGROVE
Vice President

RATE SCHEDULE G-2C
GENERAL SERVICE
(TYLER)

1. AVAILABILITY

This Rate Schedule is available to Kirkpatrick Utility Company and Tyler Gas Service Company (each of which is hereinafter called "Buyer") for the purchase of natural gas for resale in Kirkpatrick Heights and vicinity and in Tyler, Texas, and its environs, from United Gas Pipe Line Company (hereinafter called "Seller"), and where Buyer has executed with Seller a Service Agreement.

2. APPLICABILITY AND CHARACTER OF SERVICE

This Rate Schedule shall be applicable to all natural gas delivered by Seller to Buyer for resale, except such natural gas as is purchased for resale for Large Volume Industrial Use Only under "IND" Rate Schedules available to Buyer under this Tariff. Deliveries of gas hereunder shall be firm gas and shall not be subject to curtailment or interruption except as provided in Sections 11 and 12 of the General Terms and Conditions.

3. RATE

11.2¢ per MCF for all gas delivered.

4. MINIMUM BILL

None

5. MEASUREMENT BASE

Refer to Section 1.3 of General Terms and Conditions.

6. HEAT CONTENT

Refer to Section 2.2 of General Terms and Conditions.

7. GENERAL TERMS AND CONDITIONS

All of the General Terms and Conditions contained in this Original Volume No. 1 are applicable to this Rate Schedule and are made a part hereof except ~~to the extent otherwise indicated~~.

RATE SCHEDULE IND-4C
LARGE VOLUME INDUSTRIAL USE ONLY
(LIEBERMAN POWER PLANT-McMURREY REFINING COMPANY)

1. AVAILABILITY

This Rate Schedule is available to Arkansas Louisiana Gas Company and Tyler Gas Service Company (each of which is hereinafter called "Buyer") for the purchase of natural gas from United Gas Pipe Line Company (hereinafter called "Seller") for resale for large volume industrial use only to Southwestern Gas and Electric Company's Lieberman Power Plant near Shreveport, Louisiana and to McMurrey Refining Company in Tyler, Texas, and where Buyer has executed with Seller a Service Agreement for service under this Rate Schedule.

2. APPLICABILITY AND CHARACTER OF SERVICE

This Rate Schedule shall be applicable to all natural gas delivered by Seller to Buyer for resale for large volume industrial use only. Deliveries of gas hereunder shall be firm gas and shall not be subject to curtailment or interruption except as provided in Sections 11 and 12 of the General Terms and Conditions.

3. RATE

7.5¢ per MCF for all gas delivered.

4. MINIMUM BILL

Commencing with the first January billing month following the initiation of service under this Rate Schedule there shall be a minimum bill which shall be on an annual basis. The minimum annual bill shall be the product of $0.50 times the number of MCF delivered during the month of maximum deliveries during the 12 billing month period commencing with January. Should the sum of the monthly bills for each such 12-month period be less than the annual minimum bill as determined herein, then the amount that the annual minimum bill exceeds the sum of the monthly bills shall be due and payable with the twelfth month's bill.

RATE SCHEDULE IND-4C
LARGE VOLUME INDUSTRIAL USE ONLY
(LIEBERMAN POWER PLANT-McMURREY REFINING COMPANY)
(Continued)

4. MINIMUM BILL (Continued)

Provided, however, that if Seller, after being afforded a reasonable opportunity to do so, was unable to deliver to Buyer, during any one or more days during the billing month, the quantities of gas required by Buyer under this Rate Schedule on such day or days, then the Annual Minimum Bill during any year in which such month or months occur, shall be reduced by an amount equal to the product of 7.5¢ and the total aggregate number of MCF of Seller's deficiencies in delivery on such day or days during the year.

5. DETERMINATION OF DELIVERIES

Where Seller delivers gas under this Rate Schedule and under another Rate Schedule to the same Buyer at the same delivery point or through the same measuring facilities, the volume of gas to be billed under this Rate Schedule shall be determined by readings of the measuring facilities used in serving the industrial consumer specified herein.

6. MEASUREMENT BASE

Refer to Section 1.3 of General Terms and Conditions.

7. HEAT CONTENT

Refer to Section 2.2 of General Terms and Conditions.

8. GENERAL TERMS AND CONDITIONS

All of the General Terms and Conditions contained in this Original Volume No. 1 are applicable to this Rate Schedule and are made a part hereof except ~~to the extent otherwise indicated~~. See Tools 2 and 3A.

GENERAL TERMS AND CONDITIONS

Each of the following General Terms and Conditions applies to each Rate Schedule contained in this Original Volume No. 1 unless otherwise indicated herein or in the applicable Rate Schedule.

1. DEFINITIONS

The following terms, when used herein or in any agreement incorporating these General Terms and Conditions, shall have the following meaning:

1.1 The term "day" shall mean a period of 24 consecutive hours beginning as nearly as is practicable to 7:00 a.m. or at such other time as may be mutually agreed to by Seller and Buyer.

1.2 The term "billing month" shall mean the calendar month.

1.3 The term "cubic foot of gas", for the purpose of measurement of the gas delivered hereunder and for all other purposes of this Tariff is the amount of gas necessary to fill a cubic foot of space when the gas is at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch and at a base temperature of sixty (60) degrees Fahrenheit, except as provided in Section 5 for farm taps and rural services and except as otherwise specifically indicated.

1.4 The term "MCF" shall mean 1,000 cubic feet of gas.

1.5 Rate Zones - The Rate Zones shall be as follows and are indicated on the map on Sheet 3:

(a) Central Rate Zone

Extends from Fort Worth and Huntsville across the northern and eastern portion of Texas and the northern portion of Louisiana to the Village of Delta Point on the eastern edge of Louisiana.

(b) Jackson Rate Zone

Extends from the State Line of Mississippi at Vicksburg through Alabama to Pensacola, Florida, and from Slidell and Mandeville, Louisiana, eastward.

GENERAL TERMS AND CONDITIONS
(Continued)

1. DEFINITIONS (Continued)

1.5 Rate Zones (Continued)

(c) Northwest Mississippi Rate Zone

Covers the group of towns in Northwest Mississippi which are not served from the integrated United Gas Pipe Line System.

(d) Texas Gulf-San Antonio Rate Zone

Extends south and southwest from Tenaha, Texas, to below Corpus Christi on the Gulf Coast and westward to San Antonio, Texas.

1.6 The term "Billing Area Unit" shall mean each single community and its environs served from any distribution system of Buyer hereunder, including any farm taps or rural service lines of Buyer and any other customers of Buyer served with gas hereunder from delivery point(s) to Buyer located nearer to such community than to any other community for which gas is delivered to Buyer under this Tariff.

1.7 The term "Maximum Daily Delivery Obligation" sometimes referred to as "Maximum Daily Quantity" shall mean the maximum volume of gas which Seller is obligated to deliver to Buyer in any one day.

1.8 The term "Large Volume Industrial Use Only" shall mean gas delivered hereunder to Buyer for resale to those customers of Buyer to whom Buyer sells gas for industrial use only in respective amounts exceeding, or estimated to exceed, 200,000 MCF per year.

2. QUALITY

2.1 Applicable to "PL" and "T" Rate Schedules - The natural gas to be delivered under these Rate Schedules shall be merchantable gas, and:

(a) Shall be dehydrated by Seller and shall in no event have a water content in excess of seven (7) pounds of water per million (1,000,000) cubic feet of gas measured at a pressure base of fourteen and seven-tenths (14.7) pounds

GENERAL TERMS AND CONDITIONS
(Continued)

2. QUALITY (Continued)

2.1 Applicable to "PL" and "T" Rate Schedules (Continued)

per square inch and at a temperature of sixty (60) degrees Fahrenheit, as determined by dew-point apparatus approved by the Bureau of Mines.

(b) Shall be commercially free from hydrogen sulphide and shall not contain more than one (1) grain of hydrogen sulphide per one hundred (100) cubic feet as determined by quantitative test after the presence of hydrogen sulphide has been indicated by qualitative test, which shall consist of exposing a strip of white filter paper recently moistened with a solution of one hundred (100) grains of lead acetate in one hundred (100) cubic centimeters of water to the gas for one and one-half (1-1/2) minutes in an apparatus previously purged, through which the gas is flowing at the rate of approximately five (5) cubic feet per hour, the gas from the jet not impinging upon the test paper, and which qualitative test shall be deemed to be satisfied if, after this exposure, the test paper is found not distinctly darker than a second paper freshly moistened with a solution not exposed to the gas.

(c) Shall not contain more than twenty (20) grains of total sulphur per one hundred (100) cubic feet.

(d) Shall not contain in excess of:

(i) Three per cent (3%) by volume of carbon dioxide;

(ii) Applicable to "PL1" Customer:
Four per cent (4%) by volume of oxygen.
Applicable to all other "PL" and "T" Customers:
Two per cent (2%) by volume of oxygen;

or

(iii) Two-tenths (0.2) gallons per thousand (1,000) cubic feet of those certain liquifiable hydrocarbons commonly referred to as natural gasoline, as determined by the charcoal adsorption method as prescribed by the American Gas Association in its testing code #101, effective January 1, 1933.

UNITED GAS PIPE LINE COMPANY
FPC Gas Tariff
Original Volume No. 1

Original Sheet No. 72

GENERAL TERMS AND CONDITIONS
(Continued)

2. QUALITY (Continued)

2.1 Applicable to "PL" and "T" Rate Schedules (Continued)

(e) Heat Content:

(i) Applicable to Texas Eastern Transmission Corporation:

In the event that the total heating value of the gas tendered for delivery by Seller to Buyer falls below 1,000 British thermal units per cubic foot, Buyer shall have the option to refuse to accept said gas so long as said total heating value remains below 1,000 British thermal units per cubic foot, provided, and to the extent, that any of Buyer's customers rejects the gas delivered by Seller hereunder. The British thermal unit content per cubic foot shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit when saturated with water vapor and at an absolute pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

(ii) Applicable to all other "PL" customers:

In the event that the total heating value of the gas tendered for delivery by Seller to Buyer falls below 950 British thermal units per cubic foot, Buyer shall have the option to refuse to accept said gas so long as said total heating value remains below 950 British thermal units per cubic foot. The British thermal unit content per cubic foot shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure specified for measurement in the applicable Rate Schedule, and at the moisture content of the gas delivered.

(f) In addition to meeting the above specifications, the gas delivered hereunder shall be commercially free from dust, gum, gum-forming constituents, or other liquid or solid matter which might become separated from the gas in the course of transportation through the pipe line.

GENERAL TERMS AND CONDITIONS
(Continued)

2. QUALITY (Continued)

2.1 Applicable to "PL" and "T" Rate Schedules (Continued)

(g) Except as otherwise specifically provided to the contrary in the Section 2.1, all measurements of gas required in this Section 2.1 shall be at a temperature of sixty (60) degrees Fahrenheit and at an absolute pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

2.2 Applicable to all Rate Schedules other than "PL" and "T" Rate Schedules

(a) Heat Content - The gas delivered by Seller to Buyer shall have a total heating value of not less than 850 Btu per cubic foot. The Btu content per cubic foot shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of 14.9 pounds per square inch, and at the moisture content of the gas delivered.

(b) Permissible Impurities - The gas delivered by Seller to Buyer shall be reasonably free from water and other objectionable liquids, and from sand and other objectionable solids; and the gas shall not contain more than two (2) grains of hydrogen sulphide per one hundred (100) cubic feet.

2.3 Gas to be Natural Gas - The gas deliverable by Seller to Buyer shall be natural gas as produced in its natural state from the wells except that Seller may extract or permit the extraction of any of the constituents thereof.

3. MEASUREMENT

Determination of Quantity

3.1 The Sales Unit shall be one MCF.

3.2 Assumed Atmospheric Pressure - The average atmospheric pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.3 Orifice Meters other than for "PL" and "T" Rate Schedules - When orifice meters are used for the measurement of gas hereunder, the computations of the volumes of gas measured shall be made in accordance with the following Sections (a) to (j) inclusive, as to all deliveries other than under "PL" and "T" Rate Schedules.

(a) The orifice coefficient for each meter shall be calculated at the base pressure and base temperature set forth in Section 1 hereof, at a flowing temperature of sixty (60) degrees Fahrenheit and for gas of six hundred thousandths (.600) specific gravity.

(b) The temperature of the gas shall be determined by a recording thermometer so installed that it may record the temperature of the gas flowing through the meter or meters. The average of the record obtained shall be deemed to be the gas temperature for the period under consideration, and the orifice coefficient as calculated in (a) above shall be corrected for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

(c) The specific gravity of the gas shall be determined by a recording gravitometer so installed that it may record the specific gravity of the gas flowing through the meter or meters; provided, however, if Seller does not consider the installation of such recording gravitometer necessary, Seller shall make spot tests with an Edwards or other standard type specific gravity balance.

If the recording gravitometer is used, the average of the record obtained shall be deemed to be the specific gravity of the gas for the period under consideration and the orifice coefficient as calculated in Section (a) above shall be corrected for each one-thousandth (.001) variation from six hundred thousandths (.600). If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly on a day as near the first of the billing month as is practicable, or as

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.3 Orifice Meters other than for "PL" and "T" Rate Schedules (Continued)

much oftener as is found necessary in practice. The result obtained from the test made on or near the first of the billing month shall be deemed to be the specific gravity of the gas during that billing month and the orifice coefficient as calculated in Section (a) above shall be corrected accordingly for each one-thousandth (.001) variation from six hundred thousandths (.600). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(d) Exact measurements of inside diameters of pipe runs and orifices shall be obtained to the nearest one-thousandth (.001) inch, which measurements shall be used in computations of coefficients.

(e) Pressure taps for meter installations shall be taken from pipe runs two and one-half (2-1/2) inside pipe diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(f) All orifice meter computations required in this Section 3 shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931). In the computations of the orifice coefficient, the calculation of "X" shall be carried to six (6) decimals and "C'" shall be determined to three (3) decimal places by interpolations from tables on Pages 76 and 77 in Metric Metal Works Bulletin E-2 (Revised 1931). The pressure base, flowing temperature and specific gravity factors used shall consist of four (4) significant figures, unless the first digit is "1", in which case five (5) significant figures shall be used.

(g) In determining the volume of gas delivered through the orifice during a period, either the observation method or the orifice chart integrator shall be used in reading the

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.3 Orifice Meters other than for "PL" and "T" Rate Schedules (Continued)

meter chart. The sum of the extensions obtained from the reading or integration of the meter chart shall be multiplied by the orifice coeficient, corrected in accordance with Sections (b) and (c) above, to obtain the gas volume for that chart.

(h) When the average delivery pressure on the orifice meter chart is 100 pounds per square inch gauge or more, the volumes of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(i) There shall be determined the average pressure (gauge) at which the gas was delivered during the period under consideration.

(ii) The average temperature for the period under consideration will be determined as provided in Section (b) above.

(iii) There shall be selected from the table of multipliers shown in Section (j) hereof, the multiplier corresponding to the average pressure and the average temperature as determined in (i) and (ii) above.

(iv) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas determined in the manner hereinabove set forth by the multiplier selected in (iii) above.

3.3 (j) Boyle's Law Deviation Multipliers for orifice meters.

Average Pressure PSIG	Average Temperature = °F											Average Pressure PSIG
	40-44	45-49	50-54	55-59	60-64	65-69	70-74	75-79	80-84	85-89	90-94	
0-49	1.004	1.004	1.004	1.003	1.003	1.003	1.003	1.003	1.003	1.003	1.003	0-49
50-99	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	1.007	50-99
100-149	1.014	1.014	1.013	1.013	1.012	1.012	1.012	1.011	1.011	1.010	1.010	100-149
150-199	1.019	1.018	1.017	1.017	1.016	1.016	1.016	1.015	1.014	1.014	1.014	150-199
200-249	1.024	1.023	1.022	1.022	1.021	1.020	1.020	1.019	1.018	1.018	1.017	200-249
250-299	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.021	250-299
300-349	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	300-349
350-399	1.039	1.038	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	350-399
400-449	1.044	1.043	1.041	1.040	1.039	1.038	1.036	1.035	1.034	1.033	1.032	400-449
450-499	1.050	1.048	1.046	1.045	1.043	1.042	1.040	1.039	1.038	1.036	1.035	450-499
500-549	1.055	1.053	1.051	1.049	1.048	1.046	1.045	1.043	1.041	1.040	1.039	500-549
550-599	1.060	1.058	1.056	1.054	1.052	1.051	1.049	1.047	1.045	1.044	1.042	550-599
600-649	1.066	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.049	1.048	1.046	600-649
650-699	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.050	650-699
700-749	1.077	1.075	1.072	1.069	1.067	1.064	1.061	1.059	1.057	1.055	1.053	700-749
750-799	1.083	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.059	1.056	750-799
800-849	1.089	1.085	1.082	1.079	1.076	1.072	1.070	1.067	1.064	1.062	1.060	800-849
850-899	1.094	1.090	1.087	1.083	1.080	1.077	1.074	1.071	1.068	1.065	1.063	850-899
900-949	1.100	1.096	1.092	1.088	1.084	1.081	1.078	1.075	1.072	1.069	1.066	900-949
950-999	1.105	1.101	1.097	1.092	1.089	1.085	1.082	1.078	1.075	1.073	1.070	950-999
1000-1049	1.111	1.106	1.102	1.097	1.093	1.089	1.085	1.082	1.079	1.076	1.073	1000-1049
1050-1099	1.117	1.112	1.107	1.102	1.098	1.093	1.090	1.086	1.082	1.079	1.077	1050-1099
1100-1149	1.122	1.117	1.111	1.106	1.102	1.097	1.093	1.089	1.086	1.083	1.080	1100-1149
1150-1199	1.127	1.122	1.116	1.110	1.106	1.101	1.097	1.093	1.089	1.086	1.083	1150-1199
1200-1249	1.133	1.127	1.121	1.115	1.110	1.105	1.100	1.096	1.092	1.089	1.086	1200-1249
1250-1299	1.139	1.132	1.125	1.119	1.113	1.108	1.104	1.100	1.096	1.092	1.089	1250-1299
1300-1349	1.144	1.136	1.129	1.123	1.117	1.112	1.107	1.103	1.099	1.095	1.092	1300-1349
1350-1399	1.149	1.141	1.134	1.127	1.121	1.115	1.110	1.106	1.102	1.098	1.094	1350-1399
1400-1449	1.154	1.146	1.138	1.131	1.125	1.119	1.114	1.109	1.105	1.101	1.097	1400-1449
1450-1499	1.159	1.150	1.142	1.135	1.128	1.122	1.117	1.113	1.108	1.104	1.100	1450-1499

Issued By: A. D. Grasse, Vice President
Issued On: JULY 3, 1968

Effective: AUG. 8, 1968

3.3 (j) Boyle's Law Deviation Multipliers for orifice meters (Continued)

Average Pressure PSIG	Average Temperature - °F											Average Pressure PSIG
	95-99	100-104	105-109	110-114	115-119	120-124	125-129	130-134	135-139	140-144	145-149	
0-49	1.003	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	0-49
50-99	1.006	1.006	1.006	1.006	1.005	1.005	1.005	1.005	1.005	1.005	1.005	50-99
100-149	1.010	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	100-149
150-199	1.013	1.013	1.012	1.012	1.011	1.011	1.011	1.010	1.010	1.010	1.009	150-199
200-249	1.017	1.016	1.015	1.015	1.014	1.014	1.013	1.013	1.012	1.012	1.011	200-249
250-299	1.020	1.019	1.019	1.018	1.017	1.016	1.016	1.015	1.015	1.015	1.014	250-299
300-349	1.024	1.023	1.022	1.021	1.020	1.020	1.019	1.018	1.017	1.017	1.016	300-349
350-399	1.027	1.026	1.025	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	350-399
400-449	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	1.021	400-449
450-499	1.034	1.033	1.031	1.030	1.029	1.028	1.027	1.027	1.026	1.025	1.024	450-499
500-549	1.037	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	500-549
550-599	1.040	1.039	1.038	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	550-599
600-649	1.044	1.042	1.041	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.030	600-649
650-699	1.048	1.046	1.044	1.043	1.041	1.040	1.038	1.036	1.035	1.034	1.033	650-699
700-749	1.051	1.049	1.047	1.045	1.044	1.042	1.041	1.039	1.038	1.036	1.035	700-749
750-799	1.054	1.052	1.050	1.049	1.047	1.045	1.043	1.041	1.040	1.039	1.037	750-799
800-849	1.058	1.056	1.054	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	800-849
850-899	1.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	1.045	1.044	1.042	850-899
900-949	1.064	1.062	1.060	1.058	1.055	1.053	1.051	1.049	1.047	1.046	1.044	900-949
950-999	1.067	1.065	1.063	1.061	1.058	1.056	1.054	1.052	1.050	1.048	1.046	950-999
1000-1049	1.071	1.068	1.065	1.063	1.061	1.059	1.056	1.054	1.052	1.050	1.048	1000-1049
1050-1099	1.074	1.071	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.051	1050-1099
1100-1149	1.077	1.074	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1100-1149
1150-1199	1.080	1.077	1.074	1.072	1.069	1.066	1.064	1.062	1.059	1.057	1.055	1150-1199
1200-1249	1.083	1.079	1.077	1.074	1.071	1.068	1.066	1.064	1.061	1.059	1.056	1200-1249
1250-1299	1.085	1.082	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.058	1250-1299
1300-1349	1.089	1.085	1.082	1.079	1.076	1.073	1.071	1.068	1.065	1.062	1.060	1300-1349
1350-1399	1.091	1.088	1.085	1.082	1.079	1.076	1.073	1.070	1.067	1.064	1.062	1350-1399
1400-1449	1.094	1.090	1.087	1.084	1.081	1.078	1.075	1.072	1.069	1.066	1.064	1400-1449
1450-1499	1.096	1.093	1.089	1.086	1.083	1.080	1.077	1.073	1.070	1.068	1.065	1450-1499

Issued By: A. D. [redacted] Vice President
Issued On: JULY 8, 1953

Effective: AUG. 3, 1953

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SUPERSEDED

RATE SCHEDULE MID-4C
LARGE VOLUME INDUSTRIAL USE ONLY
(LIEBERMAN POWER PLANT-McMURREY REFINING COMPANY)

1. AVAILABILITY

This Rate Schedule is available to Arkansas Louisiana Gas Company and Tyler Gas Service Company (each of which is hereinafter called "Buyer") for the purchase of natural gas from United Gas Pipe Line Company (hereinafter called "Seller", for resale for large volume industrial use only to Southwestern Gas and Electric Company's Lieberman Power Plant near Shreveport, Louisiana and to McMurrey Refining Company in Tyler, Texas, and where Buyer has executed with Seller a Service Agreement for service under this Rate Schedule.

2. APPLICABILITY AND CHARACTER OF SERVICE

This Rate Schedule shall be applicable to all natural gas delivered by Seller to Buyer for resale for large volume industrial use only. Deliveries of gas hereunder shall be firm gas and shall not be subject to curtailment or interruption except as provided in Sections 11 and 12 of the General Terms and Conditions.

3. RATE

7.5¢ per MCF for all gas delivered.

4. MINIMUM BILL

Commencing with the first January billing month following the initiation of service under this Rate Schedule there shall be a minimum bill which shall be on an annual basis. The minimum annual bill shall be the product of $0.35 times the number of MCF delivered during the month of maximum deliveries during the 12 billing month period commencing with January. Should the sum of the monthly bills for each such 12-month period be less than the annual minimum bill as determined herein, then the amount that the annual minimum bill exceeds the sum of the monthly bills shall be due and payable with the twelfth month's bill.

RATE SCHEDULE DG-C
GENERAL SERVICE FOR LARGE VOLUME DISTRIBUTORS
CENTRAL RATE ZONE

1. AVAILABILITY.

This rate schedule is available to any natural gas distributor (hereinafter called "Buyer") for the purchase of natural gas from United Gas Pipe Line Company (hereinafter called "Seller") for resale in a Billing Area Unit:

(a) having a demand on any day which exceeds or is estimated to exceed 3,000 MCF, and

(b) located in Seller's Central Rate Zone

when Buyer has executed with Seller a service agreement for the purchase of natural gas for such Billing Area Unit.

2. APPLICABILITY AND CHARACTER OF SERVICE

This rate schedule shall be applicable to all natural gas delivered by Seller to Buyer for resale in such Billing Area Unit, except such gas as is purchased for resale for Large Volume Industrial Use Only under other rate schedules available to Buyer under this tariff. Deliveries of gas hereunder shall be firm gas and shall not be subject to curtailment or interruption except as provided in Sections 11 and 12 of the General Terms and Conditions.

3. RATE

20¢ per MCF for all gas delivered during the billing month up to that number of MCF obtained by multiplying the Billing Demand for the month by 8.

12.5¢ per MCF for all gas delivered during the billing month excess of the number of MCF billed at 20¢ per MCF.

4. MINIMUM BILL

The minimum bill to Buyer for any billing month for service in each Billing Area Unit under this Rate Schedule shall be 50¢ per MCF of the Billing Demand in effect for the billing month.

RATE SCHEDULE DG-C
GENERAL SERVICE FOR LARGE VOLUME DISTRIBUTORS
CENTRAL RATE ZONE
(Continued)

5. BILLING DEMAND

The Billing Demand for each Billing Area Unit shall be the maximum volume of gas taken under this Rate Schedule by Buyer for each such Billing Area Unit in any one day during the 12 month's period ending with the last day of the current billing month. The greatest day's delivery during any month at a point where gas is delivered through a positive meter or meters without a volume and pressure gauge, shall be assumed to be 0.053 times the volume of gas delivered by Seller to Buyer at such point during such month.

Provided, if and when breaks in Buyer's facilities cause an extraordinary demand on Seller, which is in excess of the demand which Buyer would otherwise have made on Seller, the extra volume of natural gas delivered on account of such extraordinary demand shall not be included in determining the Billing Demand.

Provided, further, that if Seller, after being afforded a reasonable opportunity to do so, was unable to deliver to Buyer, during any one or more days during the billing month, the quantities of gas requested by Buyer under this Rate Schedule on such day or days, up to the Billing Demand otherwise in effect for such billing month, the Billing Demand shall be reduced by an amount equal to the quotient arrived at by dividing the aggregate number of MCF of Seller's deficiencies in delivery on such day or days by the number of days in such month.

6. MEASUREMENT BASE

Refer to Section 1.3 of General Terms and Conditions.

7. HEAT CONTENT

Refer to Section 2.2 of General Terms and Conditions.

8. GENERAL TERMS AND CONDITIONS

All of the General Terms and Conditions contained in this Original Volume No. 1 are applicable to this Rate Schedule and are made a part hereof except Sections 2.1 and 3.4.

RATE SCHEDULE IND-C
LARGE VOLUME INDUSTRIAL USE ONLY
CENTRAL RATE ZONE

1. AVAILABILITY

This rate schedule is available to any natural gas distributor (hereinafter called "Buyer") for the purchase of natural gas from United Gas Pipe Line Company (hereinafter called "Seller") for resale for large volume industrial use only to industrial consumers located in Seller's Central Rate Zone, where Buyer has executed with Seller a Service Agreement for service for such industrial consumers.

2. APPLICABILITY AND CHARACTER OF SERVICE

This rate schedule shall be applicable to all natural gas delivered by Seller to Buyer for resale for such Large Volume Industrial Use Only. Deliveries of gas hereunder shall be firm gas and shall not be subject to curtailment or interruption except as provided in Sections 11 and 12 of the General Terms and Conditions.

3. RATE

13¢ per MCF for all gas delivered.

4. MINIMUM ANNUAL BILL

Commencing with the first January billing month following the initiation of service to a large volume industrial consumer, there shall be a minimum annual bill for service for each such large volume industrial consumer. The minimum annual bill applicable to service for a particular consumer shall be the product of $0.60 times the number of MCF delivered to the consumer in question during the month of maximum deliveries to such consumer during the 12 billing month period commencing with each January. Should the sum of the monthly bills for gas sold for resale to the consumer in question during the 12 month period be less than the minimum annual bill as determined herein for service for such consumer for such period, then the amount by which the minimum annual bill exceeds the sum of the monthly bills shall be due and payable with the twelfth month's bill for such period.

Provided, however, that if Seller, after being afforded a reasonable opportunity to do so, was unable to deliver to Buyer, during any one or more days during the year, the quantities of gas required by Buyer under this Rate Schedule on such day or days, then the annual minimum bill during any year in which such days occur, shall be reduced by an amount equal to the product of 13¢ and the total aggregate number of MCF of Seller's deficiencies in delivery on such day or days during the year.

Issued By: A. D. Greene, Vice President
Issued On: June 15, 1953

Effective: July 15, 1953

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RATE SCHEDULE IND-C
LARGE VOLUME INDUSTRIAL USE ONLY
CENTRAL RATE ZONE
(Continued)

5. ADJUSTMENT FOR HEATING VALUE

The rate per MCF in this rate schedule is based upon the delivery of natural gas having an average total heating value of 1,000 British thermal units per cubic foot. Should Seller, during any billing month, deliver to Buyer gas containing less or more than 1,000 BTU per cubic foot, the monthly bill for such gas so delivered during such billing month shall be decreased or increased 0.1% for each BTU below or above 1,000 BTU per cubic foot.

6. DETERMINATION OF DELIVERIES

Where Seller delivers gas under this Rate Schedule and under another Rate Schedule to the same Buyer at the same delivery point or through the same measuring facilities, the volume of gas to be billed under this Rate Schedule shall be determined by readings of the measuring facilities used in serving the industrial consumers.

7. MEASUREMENT BASE

Refer to section 1.3 of the General Terms and Conditions.

8. GENERAL TERMS AND CONDITIONS

All of the General Terms and Conditions contained in this Original Volume No. 1 are applicable to this Rate Schedule and are made a part hereof except Sections 2.1 and 3.4.

GENERAL TERMS AND CONDITIONS

Each of the following General Terms and Conditions applies to each rate schedule contained in this First Revised Volume No. 1 unless otherwise indicated herein or in the applicable rate schedule.

1. DEFINITIONS

The following terms, when used herein or in any agreement incorporating these General Terms and Conditions, shall have the following meaning:

1.1 The term "day" shall mean a period of 24 consecutive hours beginning as nearly as is practicable to 7:00 a.m. or at such other time as may be mutually agreed to by Seller and Buyer.

1.2 The term "billing month" shall mean the calendar month.

1.3 The term "cubic foot of gas", for the purpose of measurement of the gas delivered hereunder and for all other purposes of this Tariff is the amount of gas necessary to fill a cubic foot of space when the gas is at an absolute pressure of fourteen and nine-tenths (14.9) pounds per square inch and at a base temperature of sixty (60) degrees Fahrenheit, except as provided in Section 5 for farm taps and rural services and except as otherwise specifically indicated.

1.4 The term "Mcf" shall mean 1,000 cubic feet of gas.

1.5 Rate Zones - The Rate Zones shall be as follows and are indicated on the map on Sheet 3:

(a) Central Rate Zone

Extends from Fort Worth and Huntsville across the northern and eastern portion of Texas and the northern portion of Louisiana to the Village of Delta Point on the eastern edge of Louisiana.

UNITED GAS PIPE LINE COMPANY
FPC Gas Tariff
First Revised Volume No. 1

Original Sheet No. 50

GENERAL TERMS AND CONDITIONS
(Continued)

1. DEFINITIONS (Continued)

1.5 Rate Zones (Continued)

(b) Jackson Rate Zone

Extends from the State Line of Mississippi at Vicksburg through Alabama to Pensacola, Florida, and from Slidell and Mandeville, Louisiana, eastward.

(c) Northwest Mississippi Rate Zone

Covers the group of towns in Northwest Mississippi which are not served from the integrated United Gas Pipe Line System.

1.6 The term "Billing Area Unit" shall mean each single community and its environs served from any distribution system of Buyer hereunder, including any farm taps or rural service lines of Buyer and any other customers of Buyer served with gas hereunder from delivery point(s) to Buyer located nearer to such community than to any other community for which gas is delivered to Buyer under this Tariff.

1.7 The term "Maximum Daily Delivery Obligation" sometimes referred to as "Maximum Daily Quantity" shall mean the maximum volume of gas which Seller is obligated to deliver to Buyer in any one day.

1.8 The term "Large Volume Industrial Use Only" shall mean gas delivered hereunder to Buyer for resale to those customers of Buyer to whom Buyer sells gas for industrial use only in respective amounts exceeding, or estimated to exceed, 200,000 Mcf per year.

Issued By: A. D. Greene, Vice President
Issued On: December 1, 1954

Effective: August 1, 1954

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GENERAL TERMS AND CONDITIONS
(Continued)

2. QUALITY

2.1 Applicable to "PL" and "T" Rate Schedules - The natural gas to be delivered under these rate schedules shall be merchantable gas, and:

(a) Shall be dehydrated by Seller and shall in no event have a water content in excess of seven (7) pounds of water per million (1,000,000) cubic feet of gas measured at a pressure base of fourteen and seven-tenths (14.7) pounds per square inch and at a temperature of sixty (60) degrees Fahrenheit, as determined by dew-point apparatus approved by the Bureau of Mines.

(b) Shall be commercially free from hydrogen sulphide and shall not contain more than one (1) grain of hydrogen sulphide per one hundred (100) cubic feet as determined by quantitative test after the presence of hydrogen sulphide has been indicated by qualitative test, which shall consist of exposing a strip of white filter paper recently moistened with a solution of one hundred (100) grains of lead acetate in one hundred (100) cubic centimeters of water to the gas for one and one-half (1-1/2) minutes in an apparatus previously purged, through which the gas is flowing at the rate of approximately five (5) cubic feet per hour, the gas from the jet not impinging upon the test paper, and which qualitative test shall be deemed to be satisfied if, after this exposure, the test paper is found not distinctly darker than a second paper freshly moistened with a solution not exposed to the gas.

(c) Shall not contain more than twenty (20) grains of total sulphur per one hundred (100) cubic feet.

(d) Shall not contain in excess of

(1) Three per cent (3%) by volume of carbon dioxide;

GENERAL TERMS AND CONDITIONS
(Continued)

2. QUALITY (Continued)

2.1 Applicable to "PL" and "T" Rate Schedules (Continued)

(ii) Applicable to Jackson Rate Zone Buyers:
Four per cent (4%) by volume of oxygen
Applicable to Central Rate Zone Buyers:
Two per cent (2%) by volume of oxygen;

or

(iii) Two-tenths (0.2) gallons per thousand (1,000) cubic feet of those certain liquefiable hydrocarbons commonly referred to as natural gasoline, as determined by the Charcoal absorption method as prescribed by the American Gas Association in its testing code #101, effective January 1, 1933.

(e) Heat Content:

In the event that the total heating value of the gas tendered for delivery by Seller to Buyer fails below 950 British thermal units per cubic foot, Buyer shall have the option to refuse to accept said gas so long as said total heating value remains below 950 British thermal units per cubic foot; provided that if any of Buyer's customers have the right to reject the gas delivered by Seller hereunder in the event the total heating value of said gas falls below a value in excess of 950 British thermal units per cubic foot, then Buyer shall only have the option to refuse to accept said gas so long as said total heating value remains below such Btu value, provided, and to the extent that any of Buyer's said customers reject said gas. The British thermal unit content per cubic foot shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of 14.9 pounds per square inch, and at the moisture content of the gas delivered.

GENERAL TERMS AND CONDITIONS
(Continued)

2. QUALITY (Continued)

2.1 Applicable to "PL" and "T" Rate Schedules (Continued)

(f) In addition to meeting the above specifications, the gas delivered hereunder shall be commercially free from dust, gum, gum-forming constituents, or other liquid or solid matter which might become separated from the gas in the course of transportation through the pipe line.

(g) Except as otherwise specifically provided to the contrary in this Section 2.1, all measurements of gas required in this Section 2.1 shall be at a temperature of sixty (60) degrees Fahrenheit and at an absolute pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

2.2 Applicable to all Rate Schedules other than "PL" and "T" Rate Schedules

(a) Heat Content - The gas delivered by Seller to Buyer shall have a total heating value of not less than 850 Btu per cubic foot. The Btu content per cubic foot shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit, at an absolute pressure of 14.9 pounds per square inch, and at the moisture content of the gas delivered.

(b) Permissible Impurities - The gas delivered by Seller to Buyer shall be reasonably free from water and other objectionable liquids, and from sand and other objectionable solids; and the gas shall not contain more than two (2) grains of hydrogen sulphide per one hundred (100) cubic feet.

2.3 Gas to be Natural Gas - The gas deliverable by Seller to Buyer shall be natural gas as produced in its natural state from the wells except that Seller may extract or permit the extraction of any of the constituents thereof.

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT

Determination of Quantity

3.1 The Sales Unit shall be one Mcf.

3.2 Assumed Atmospheric Pressure - The average atmospheric pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

3.3 Orifice Meters other than for "PL" and "T" Rate Schedules- When orifice meters are used for the measurement of gas hereunder, the computations of the volumes of gas measured shall be made in accordance with the following Sections (a) to (j) inclusive, as to all deliveries other than under "PL" and "T" Rate Schedules.

(a) The orifice coefficient for each meter shall be calculated at the base pressure and base temperature set forth in Section 1 hereof, at a flowing temperature of sixty (60) degrees Fahrenheit and for gas of six hundred thousandths (.600) specific gravity.

(b) The temperature of the gas shall be determined by a recording thermometer so installed that it may record the temperature of the gas flowing through the meter or meters. The average of the record obtained shall be deemed to be the gas temperature for the period under consideration, and the orifice coefficient as calculated in (a) above shall be corrected for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

(c) The specific gravity of the gas shall be determined by a recording gravitometer so installed that it may record the specific gravity of the gas flowing through the meter or meters; provided, however, if Seller does not consider the installation of such recording gravitometer necessary, Seller shall make spot tests with an Edwards or other standard type specific gravity balance.

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.3 Orifice Meters other than for "PL" and "T" Rate Schedules (Continued)

If the recording gravitometer is used, the average of the record obtained shall be deemed to be the specific gravity of the gas for the period under consideration and the orifice coefficient as calculated in Section (a) above shall be corrected for each one-thousandth (.001) variation from six hundred thousandths (.600). If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined once monthly on a day as near the first of the billing month as is practicable, or as much oftener as is found necessary in practice. The result obtained from the test made on or near the first of the billing month shall be deemed to be the specific gravity of the gas during that billing month and the orifice coefficient as calculated in Section (a) above shall be corrected accordingly for each one-thousandth (.001) variation from six hundred thousandths (.600). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(d) Exact measurements of inside diameters of pipe runs and orifices shall be obtained to the nearest one-thousandth (.001) inch, which measurements shall be used in computations of coefficients.

(e) Pressure taps for meter installations shall be taken from pipe runs two and one-half (2-1/2) inside pipe diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(f) All orifice meter computations required in this Section 3 shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931). In the computations of the orifice coefficient, the calculation of "X" shall be carried to six (6) decimals and "C" shall be determined to three (3) decimal places by interpolations from tables on Pages 76 and 77 in Metric Metal Works Bulletin E-2 (Revised 1931). The pressure base,

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.3 Orifice Meters other than for "PL" and "T" Rate Schedules (Continued)

flowing temperature and specific gravity factors used shall consist of four (4) significant figures, unless the first digit is "1", in which case five (5) significant figures shall be used.

(g) In determining the volume of gas delivered through the orifice during a period, either the observation method or the orifice chart integrator shall be used in reading the meter chart. The sum of the extensions obtained from the reading or integration of the meter chart shall be multiplied by the orifice coefficient, corrected in accordance with Sections (b) and (c) above, to obtain the gas volume for that chart.

(h) The volumes of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(i) There shall be determined the average pressure (gauge) at which the gas was delivered during the period under consideration.

(ii) The average temperature for the period under consideration will be determined as provided in Section (b) above.

(iii) There shall be selected from the table of multipliers shown in Section (j) hereof, the multiplier corresponding to the average pressure and the average temperature as determined in (i) and (ii) above.

(iv) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas determined in the manner hereinabove set forth by the multiplier selected in (iii) above.

3.3 (J) Boyle's Law Deviation Multipliers for orifice meters

Average Pressure PSIG	Average Temperature - °F													
	40-44	45-49	50-54	55-59	60-64	65-69	70-74	75-79	80-84	85-89	90-94	Average Pressure PSIG
0-49	1.004	1.004	1.004	1.003	1.003	1.003	1.003	1.003	1.003	1.003	1.003	0-49
50-99	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	1.007	50-99
100-149	1.014	1.014	1.013	1.013	1.012	1.012	1.012	1.011	1.011	1.010	1.010	100-149
150-199	1.019	1.018	1.017	1.017	1.016	1.016	1.016	1.015	1.014	1.014	1.014	150-199
200-249	1.024	1.023	1.022	1.022	1.021	1.020	1.020	1.019	1.018	1.018	1.017	200-249
250-299	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.021	250-299
300-349	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	300-349
350-399	1.039	1.038	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	350-399
400-449	1.044	1.043	1.041	1.040	1.039	1.038	1.036	1.035	1.034	1.033	1.032	400-449
450-499	1.050	1.048	1.046	1.045	1.043	1.042	1.040	1.039	1.038	1.036	1.035	450-499
500-549	1.055	1.053	1.051	1.049	1.048	1.046	1.045	1.043	1.041	1.040	1.039	500-549
550-599	1.060	1.058	1.056	1.054	1.052	1.051	1.049	1.047	1.045	1.044	1.042	550-599
600-649	1.066	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.049	1.048	1.046	600-649
650-699	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.050	650-699
700-749	1.077	1.075	1.072	1.069	1.067	1.064	1.061	1.059	1.057	1.055	1.053	700-749
750-799	1.083	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.059	1.056	750-799
800-849	1.089	1.085	1.082	1.079	1.076	1.072	1.070	1.067	1.064	1.062	1.060	800-849
850-899	1.094	1.090	1.087	1.083	1.080	1.077	1.074	1.071	1.068	1.065	1.063	850-899
900-949	1.100	1.096	1.092	1.088	1.084	1.081	1.078	1.075	1.072	1.069	1.066	900-949
950-999	1.105	1.101	1.097	1.092	1.089	1.085	1.082	1.078	1.075	1.073	1.070	950-999
1000-1049	1.111	1.106	1.102	1.097	1.093	1.089	1.085	1.082	1.079	1.076	1.073	1000-1049
1050-1099	1.117	1.112	1.107	1.102	1.098	1.093	1.090	1.086	1.082	1.079	1.077	1050-1099
1100-1149	1.122	1.117	1.111	1.106	1.102	1.097	1.093	1.089	1.086	1.083	1.080	1100-1149
1150-1199	1.127	1.122	1.116	1.110	1.106	1.101	1.097	1.093	1.089	1.086	1.083	1150-1199
1200-1249	1.133	1.127	1.121	1.115	1.110	1.105	1.100	1.096	1.092	1.089	1.086	1200-1249
1250-1299	1.139	1.132	1.125	1.119	1.113	1.108	1.104	1.100	1.096	1.092	1.089	1250-1299
1300-1349	1.144	1.136	1.129	1.123	1.117	1.112	1.107	1.103	1.099	1.095	1.092	1300-1349
1350-1399	1.149	1.141	1.134	1.127	1.121	1.115	1.110	1.106	1.102	1.098	1.094	1350-1399
1400-1449	1.154	1.146	1.138	1.131	1.125	1.119	1.114	1.109	1.105	1.101	1.097	1400-1449
1450-1499	1.159	1.150	1.142	1.135	1.128	1.122	1.117	1.113	1.108	1.104	1.100	1450-1499

Issued By: A. D. Greene, Vice President
Issued On: December 1, 1954

Effective: August 1, 1954

3.3 (J) Boyle's Law Deviation Multipliers for orifice meters (Continued)

Average Pressure PSIG	Average Temperature - °F.												Average Pressure PSIG
	95-99	100-104	105-109	110-114	115-119	120-124	125-129	130-134	135-139	140-144	145-149	
0-49	1.003	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	0-49
50-99	1.006	1.006	1.006	1.006	1.005	1.005	1.005	1.005	1.005	1.005	1.005	50-99
100-149	1.010	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	100-149
150-199	1.013	1.013	1.012	1.012	1.011	1.011	1.011	1.010	1.010	1.010	1.009	150-199
200-249	1.017	1.016	1.015	1.015	1.014	1.014	1.013	1.013	1.012	1.012	1.011	200-249
250-299	1.020	1.019	1.019	1.018	1.017	1.016	1.016	1.015	1.015	1.015	1.014	250-299
300-349	1.024	1.023	1.022	1.021	1.020	1.020	1.019	1.018	1.017	1.017	1.016	300-349
350-399	1.027	1.026	1.025	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	350-399
400-449	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	1.021	400-449
450-499	1.034	1.033	1.031	1.030	1.029	1.028	1.027	1.027	1.026	1.025	1.024	450-499
500-549	1.037	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	500-549
550-599	1.040	1.039	1.038	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	550-599
600-649	1.044	1.042	1.041	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.030	600-649
650-699	1.048	1.046	1.044	1.043	1.041	1.040	1.038	1.036	1.035	1.034	1.033	650-699
700-749	1.051	1.049	1.047	1.045	1.044	1.042	1.041	1.039	1.038	1.036	1.035	700-749
750-799	1.054	1.052	1.050	1.049	1.047	1.045	1.043	1.041	1.040	1.039	1.037	750-799
800-849	1.058	1.056	1.054	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	800-849
850-899	1.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	1.045	1.044	1.042	850-899
900-949	1.064	1.062	1.060	1.058	1.055	1.053	1.051	1.049	1.047	1.046	1.044	900-949
950-999	1.067	1.065	1.063	1.061	1.058	1.056	1.054	1.052	1.050	1.048	1.046	950-999
1000-1049	1.071	1.068	1.065	1.063	1.061	1.059	1.056	1.054	1.052	1.050	1.048	1000-1049
1050-1099	1.074	1.071	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.051	1050-1099
1100-1149	1.077	1.074	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1100-1149
1150-1199	1.080	1.077	1.074	1.072	1.069	1.066	1.064	1.062	1.059	1.057	1.055	1150-1199
1200-1249	1.083	1.079	1.077	1.074	1.071	1.068	1.066	1.064	1.061	1.059	1.056	1200-1249
1250-1299	1.085	1.082	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.058	1250-1299
1300-1349	1.089	1.085	1.082	1.079	1.076	1.073	1.071	1.068	1.065	1.062	1.060	1300-1349
1350-1399	1.091	1.088	1.085	1.082	1.079	1.076	1.073	1.070	1.067	1.064	1.062	1350-1399
1400-1449	1.094	1.090	1.087	1.084	1.081	1.078	1.075	1.072	1.069	1.066	1.064	1400-1449
1450-1499	1.096	1.093	1.089	1.086	1.083	1.080	1.077	1.073	1.070	1.068	1.065	1450-1499

Issued By: A. D. Greene, Vice President
Issued On: December 1, 1954

Effective: August 1, 1954

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.4 Orifice Meters for "PL" and "T" Rate Schedules - Computations of volumes measured under "PL" and "T" Rate Schedules shall be in accordance with the following Subsections (a) through (h):

(a) The orifice coefficient for each meter shall be calculated at the base pressure and base temperature set forth in Section 1 hereof, at a flowing temperature of sixty (60) degrees Fahrenheit and for gas of six hundred thousandths (.600) specific gravity.

(b) The temperature of the gas shall be determined by means of a recording thermometer of standard manufacture acceptable to both parties and so installed that it may properly record the temperature of the gas flowing through the meter or meters, and the average of the twenty-four (24) hour record from the recording thermometer shall be deemed to be the gas temperature for that day, and the orifice coefficient as calculated in (a) above shall be corrected daily for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

(c) The specific gravity of the gas shall be determined by a recording gravitometer of standard manufacture acceptable to both parties and so installed by Seller that the specific gravity of the gas will be properly determined; or, if Seller does not consider it necessary to install a recording gravitometer at the point where tests are to be made, spot tests shall be made with an Edwards type gas balance, or by such other method as shall be agreed upon between the parties.

If the recording gravitometer is used, the average of the twenty-four (24) hour record for the recording instrument shall be deemed to be the specific gravity of the gas for that day and the orifice coefficient as calculated in (a) above shall be corrected daily for each one-thousandth

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.4 Orifice Meters for "PL" and "T" Rate Schedules (Continued)

(.001) variation from six hundred thousandths (.600). If the spot test method is used, the specific gravity of the natural gas delivered hereunder shall be determined once monthly on a day as near the first of the month as is practicable, or as much oftener as is found necessary in practice. The result obtained from the test made on or near the first of the month shall be deemed to be the specific gravity of the gas during that billing month and the orifice coefficient as calculated in (a) above shall be corrected accordingly for each one-thousandth (.001) variation from six hundred thousandths (.600). Any special test which is made shall be applicable from the day made until the next regular test or other special test is made.

(d) Exact measurements of inside diameters of pipe runs and orifices shall be obtained by means of a micrometer to the nearest one-thousandth (.001) inch, which measurements shall be used in computations of coefficients.

(e) Pressure taps for meter installations shall be taken from pipe runs two and one-half (2-1/2) inside pipe diameters upstream and eight (8) inside pipe diameters downstream from the orifice.

(f) All orifice meter computations required in this Section shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931). In the computations of the hourly orifice coefficient, the calculation of "F" shall be carried to six (6) decimals and "C'" shall be determined to three (3) decimal places by interpolations from tables on Pages 76 and 77 of Metric Metal Works Bulletin E-2 (Revised 1931). The pressure base, flowing temperature and specific gravity factors used shall consist of four (4) significant figures, unless the first digit is "1", in which case five (5) significant figures shall be used.

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.4 Orifice Meters for "PL" and "T" Rate Schedules (Continued)

(g) In determining the volume of gas delivered through the orifice during a daily period, either the observation method or the orifice chart integrator shall be used in reading the meter chart. The sum of the extensions obtained from the reading or integration of the meter chart shall be multiplied by the hourly orifice coefficient, corrected in accordance with paragraphs (b) and (c) above, to obtain the gas volume for that chart.

(h) The volumes of gas as determined in Subsections (a) through (g) above shall be adjusted to give effect to the deviation of such gas from Boyle's law in the same manner as set forth in Section 3.3 (h) and (j) above.

3.5 Positive Meters - When positive meters are used for the measurement of gas, the flowing temperature of the gas delivered shall be assumed to be sixty (60) degrees Fahrenheit, and no correction shall be made for any variation therefrom; provided, however, that Seller shall have the option of installing a recording thermometer and if Seller exercises such option and installs such thermometer, correction shall be made for each degree variation in the average flowing temperature for each positive meter chart.

The volumes of gas determined shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(a) There shall be determined the average pressure (gauge) at which the gas was delivered during the period under consideration.

(b) The average temperature for the period under consideration will be determined as provided above.

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.5 Positive Meters (Continued)

(c) When the flowing temperature of the gas delivered is assumed to be sixty (60) degrees Fahrenheit, there shall be selected from the table of positive meter multipliers, shown in Section 3.5 (e) hereof, the multiplier corresponding to the average pressure as determined in (a) above; and, when the flowing temperature of the gas delivered be recorded as provided above, the multiplier shall be obtained by squaring the appropriate multiplier selected from the table of Section 3.3 (j) above.

(d) The corrected volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas hereinabove determined by the multiplier selected in (c) above.

(e) Boyle's law Deviation Multipliers for Positive Meters:

Average Pressure PSIG	Assumed Temperature 60°F.
0-49	1.006
50-99	1.016
100-149	1.025
150-199	1.033
200-249	1.042
250-299	1.051
300-349	1.061
350-399	1.070
400-449	1.079
450-499	1.088

If at any time the composition of the gas delivered hereunder shall have materially changed so that the multipliers set out in Sections 3.3 (j) and 3.5 (e) hereof are no longer reasonable, Seller shall substitute reasonable multipliers.

GENERAL TERMS AND CONDITIONS
(Continued)

3. MEASUREMENT (Continued)

Determination of Quantity (Continued)

3.6 Determination of Heat Content - The total heating value of the gas delivered hereunder shall be determined by Seller, using a Thomas or other standard type calorimeter, either by taking a spot sample or by using a record from a recording calorimeter. The spot sample shall be taken as often as is found necessary in practice or the recording calorimeter shall be located at a suitable point on Seller's line so that the heating value of the gas delivered may be obtained. The moisture content of the gas delivered hereunder shall be determined at a suitable point by Seller as often as is found necessary in practice.

4. MEASUREMENT EQUIPMENT

4.1 Ownership and Operation - Except as otherwise provided in this paragraph and in Section 4.5 hereof, and except for deliveries where readings from Buyer's meter(s) are used for billing purposes, Seller shall furnish, install, operate and maintain, at its own expense at the point(s) of delivery, the meters, instruments and equipment of standard type necessary to measure properly, in accordance with Section 3 hereof, the gas to be delivered hereunder. Seller shall likewise furnish, install, operate and maintain, at its own expense, such instruments and equipment as may be necessary at points other than the point(s) of delivery hereunder to obtain the information to measure properly, in accordance with Section 3 hereof, the gas to be delivered hereunder. Where Buyer provides such measuring equipment and Seller does not have such equipment installed, Seller shall have the right, for as long as it elects, not to install such meters, instruments and equipment so provided by Buyer, in which event and until Seller installs such measuring equipment, measurement of the gas shall be by Buyer's measuring equipment only. The metering and other equipment installed, together with any buildings erected by it for such equipment, shall be and remain the property of the installing party.

GENERAL TERMS AND CONDITIONS
(Continued)

4. MEASUREMENT EQUIPMENT (Continued)

4.1 Ownership and Operation (Continued)

Whenever facilities of either party, required for or incidental to proper performance under the Service Agreement are located on premises of the other, then to the extent that it may have the right to do so, such party grants to the owner of said facilities the right of free ingress and egress to such premises at all times for the purposes of installation, operation, repair or removal of such facilities.

Either party shall have access to the metering equipment of the other at all reasonable times, but the reading, calibration and adjustment thereof and changing of charts (except where otherwise mutually agreed upon) shall be done only by the employees or agents of the owner thereof. Charts and records from such metering equipment shall remain the property of the owner thereof. Upon request of the other party, the requested party will submit its records and charts from its metering equipment, together with calculations therefrom, for the requesting party's inspection and verification, subject to return within ten (10) days after receipt thereof, after which return they shall be kept on file by the owner thereof for the mutual use of both parties for a period of one (1) year.

4.2 Buyer's Meters - Buyer may, at its option and expense, install and operate meters, instruments and equipment of standard type at or near any point of delivery either to check Seller's meters, instruments and equipment, or to measure the gas delivered to Buyer where Seller has not installed a meter, but the measurement of gas delivered hereunder shall be by Seller's meters only, except in cases herein provided to the contrary. The meters, instruments and equipment installed by Buyer shall be subject at all reasonable times to inspection or examination by Seller, but the reading, calibration and adjustment thereof and changing of charts (except where otherwise mutually agreed upon) shall be done only by Buyer.

GENERAL TERMS AND CONDITIONS
(Continued)

4. MEASUREMENT EQUIPMENT (Continued)

4.3 Notice of Meter Tests - Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the test so that the other party may conveniently have its representative present; provided, however, that if either party has given such notice to the other party and the other party is not present at the time specified, then the party giving the notice may proceed with the test as though the other party were present.

At least once each 30 days, on a day as near the first of each month as practical, each party shall calibrate its orifice meters and appurtenant instruments, and at least once each 90 days, on a day as near the first of the month as practical, each party shall calibrate its positive displacement meters, all in the presence of representatives of the other, as hereinabove provided in this Section, and the parties shall jointly observe any adjustment made.

4.4 Correction for Errors of Meters - If, upon any test, the percentage of inaccuracy of any metering equipment is found to be in excess of two per cent (2%), registrations thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable, and if not ascertainable, then back one-half of the time elapsed since the last date of calibration. If for any reason, meters are out of service or out of repair, so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereof upon the basis of the best dat available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

GENERAL TERMS AND CONDITIONS
(Continued)

4. MEASUREMENT EQUIPMENT (Continued)

4.4 Correction for Errors of Meters (Continued)

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meters were registering accurately.

4.5 Farm Taps and Rural Consumers - Where provision is made in any Service Agreement for sale of gas for resale to rural consumers through farm taps or rural service lines, Buyer shall install, operate and maintain at its own cost and expense the high pressure regulators, meters, low pressure regulators and such other equipment as may be necessary to measure gas and enable Buyer to receive such gas at the varying pressures in Seller's lines at the point or points of delivery; provided, however, that Seller shall always have the right to install meters and meter stations if it so desires at all or any such delivery points.

5. BILLING

5.1 Statements by Buyer - On or before the fifth day of each calendar month Buyer shall render to Seller at such office as Seller may designate, a statement showing for the preceding billing month the following volumes (tabulated separately by Billing Area Units where applicable), Sections (a), (b) and (c) not being applicable to "PL" and "T" Rate Schedules:

(a) For all rural consumers served through farm taps where the meter is at or near the point of delivery by Seller: The Volume of gas billed to such consumers.

(b) For all rural consumers served through farm taps where the meter is not near the point of delivery by Seller, and for communities where neither Seller nor Buyer maintains a town border meter: (i) The total volume of gas billed to such consumer by Buyer, and (ii) An amount equivalent to five per cent (5%) of such total volume to cover lost and unaccounted-for gas.

GENERAL TERMS AND CONDITIONS
(Continued)

5. BILLING (Continued)

5.1 Statements by Buyer (Continued)

(c) For industrial or other customers of Buyer where the volumes delivered by Buyer to its customers are required by Seller for its billings to Buyer: The volumes so delivered, aggregate or separate as required by Seller in accordance with the applicable rate schedules, with a statement of respective daily volumes delivered by Buyer to Large Volume Industrial Use Only customers, all such volumes to be shown on the basis of measurement provided in Section 1.3 hereof.

(d) For all deliveries of gas where the gas is measured by Buyer's measuring equipment, as provided in Section 4, and Buyer changes and reads the charts: The volume of gas delivered at each point of delivery.

5.2 Billing by Seller - On or before the tenth day of each calendar month Seller shall render to Buyer at such office as Buyer may designate, statements showing the calculation of the monthly bill for gas delivered hereunder by Seller to Buyer during the preceding billing month.

6. PAYMENTS

6.1 Payment Date - On or before the twentieth day of each calendar month Buyer shall make payments to Seller, at such office as Seller may designate, amounts due Seller as shown by statements furnished Buyer in accordance with the foregoing Section 5.2.

6.2 Late Payment - In the event Buyer shall fail to pay any amount due Seller hereunder when the same is due, then interest thereon shall accrue at the rate of six per cent (6%) per annum from date when such amount is due until the same is paid. If such failure to pay continues for 60 days, Seller may, upon receipt of appropriate governmental authority, suspend deliveries of gas hereunder, and the exercise of such right shall be in addition to any and all other remedies available to Seller.

GENERAL TERMS AND CONDITIONS
(Continued)

6. PAYMENTS (Continued)

6.3 Error in Bills - In the event an error is discovered in the amount billed in any statement rendered by Seller, such error shall be adjusted promptly, provided that claim therefor shall have been made within 12 months from the date of payment.

6.4 Late Billing - If presentation of a bill to Buyer is delayed after the tenth day of the month, then the time of payment shall be extended accordingly unless Buyer is responsible for such delay.

7. ACCESS TO BILLING DATA

Buyer and Seller shall have the right to examine the books, records, and charts of the other party at all reasonable times to the extent necessary to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any section hereof.

8. DELIVERY PRESSURE(S), DELIVERY POINT(S) AND HOURLY DELIVERIES

Within any limits as to maximum or minimum pressure(s) specified in the Service Agreement, the gas shall be delivered hereunder at such pressure(s) as may be necessary to meet Buyer's requirements and as Seller may have available, from time to time, at the point(s) of delivery designated or provided for in the Service Agreement.

Deliveries of gas to Buyer shall be in as nearly equal hourly quantities as is practical, except where Buyer's operations require tolerances therefrom as specified in the Service Agreement.

GENERAL TERMS AND CONDITIONS
(Continued)

9. POSSESSION OF GAS

Under any Service Agreement covering any sale of gas Seller shall be in exclusive control and possession of the gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage caused thereby.

Under any Service Agreement covering transportation of gas Buyer shall be in exclusive control and possession of the gas to be transported hereunder and responsible for any damage caused thereby until the same shall have been delivered to Seller, after which delivery Seller shall be in exclusive control and possession thereof and responsible for any injury or damage caused thereby until redelivered to Buyer after which redelivery Buyer shall be in exclusive control and possession of such gas and responsible for any injury or damage caused thereby.

10. WARRANTY

Seller warrants generally the title to all gas delivered hereunder, and agrees to indemnify Buyer from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

11. FORCE MAJEURE

11.1. Definition of "Force Majeure" - The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of

GENERAL TERMS AND CONDITIONS
(Continued)

11. FORCE MAJEURE (Continued)

11.1 Definition of "Force Majeure" (Continued)

pipe, partial or entire failure of wells, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome; such terms shall likewise include (a), in those instances where either Seller or Buyer is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses and (b), in those instances where either Seller or Buyer is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permissions from any governmental agency to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost, and after the exercise of reasonable diligence, such materials and supplies permits and permissions.

11.2 Limitations on Obligations - In the event of either Buyer or Seller being rendered unable wholly or in part by force majeure to carry out its obligations under the Service Agreement, other than to make payments due thereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligations of the party giving such notice so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall as far as possible be remedied with all reasonable dispatch.

GENERAL TERMS AND CONDITIONS
(Continued)

11. FORCE MAJEURE (Continued)

11.3 Strikes and Lockouts - The settlement of strikes and lockouts shall be entirely within the discretion of the party having the difficulty, and the above requirements that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

12. IMPAIRMENT OF DELIVERIES

12.1 Proration of Impaired Deliveries - Seller delivers gas to (a) gas utilities, and pipe line companies which deliver gas to gas utilities, for resale to domestic and industrial consumers, (b) steam electric power plants for use in generating electricity which is sold to domestic consumers, and (c) industrial consumers. In the event a shortage of gas renders Seller unable to supply the full gas requirements of all of its consumers, then, Seller may, without liability to Buyer, prorate its gas supply in the manner hereinafter set forth after first making allowance for all gas required by Seller for the operation of any of its facilities. The gas requirements of gas utilities, and pipe line companies delivering gas to gas utilities, which sell gas to domestic consumers (but only to the extent of gas required for resale to such domestic consumers) shall first be supplied by Seller. If Seller is unable to supply gas for all the requirements of such gas utilities and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then gas for such requirements shall be supplied ratably. In the event Seller is able to supply gas for all the requirements of such gas utilities, and pipe line companies delivering gas to gas utilities, for resale to domestic consumers, then there shall next be supplied the gas requirements of steam electric power plants using gas for the generation of electricity which is sold to domestic consumers, whether such power plants purchase their requirements from Seller or from gas utilities or from pipe line companies, purchasing their requirements from Seller; and, if Seller does not have sufficient gas to supply all of the requirements of said power

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GENERAL TERMS AND CONDITIONS
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12. IMPAIRMENT OF DELIVERIES (Continued)

12.1 Proration of Impaired Deliveries (Continued)

plants, then said requirements shall be supplied ratably. After the above requirements have been supplied, the remaining gas supply, if any, shall be prorated by Seller among its other customers, to the extent of gas sold by them to their other consumers. In the event of any shortage of gas as in this Section provided, Buyer shall discontinue service of gas to its consumers during the period of any such shortage to the extent which may be necessary consistent to the provisions hereof.

In certain instances Seller supplies less than the full requirements of certain of its customers, and there may be times when Seller supplies less than the full requirements of Buyer hereunder and it is the intent of this Section that any priority granted hereunder shall run only to that part of the requirements of each ultimate consumer as is being currently supplied by gas furnished by Seller, directly or indirectly.

12.2 Alteration and Repairs to Facilities - Seller may, without liability to Buyer, interrupt its service for the purpose of making necessary alterations and repairs to its pipe lines and other facilities, but only for such time as may be reasonable or unavoidable; and Seller shall give to Buyer, except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruptions so as to inconvenience Buyer and the other customers of Seller as little as possible. Seller shall give to Buyer reasonable notice before resuming service after the same has been interrupted and agrees that it will not resume service hereunder until after having given Buyer reasonable time after notice within which to have a representative present when gas is again turned into Buyer's lines.

GENERAL TERMS AND CONDITIONS
(Continued)

13. SERVICE AGREEMENT

13.1 Form of Service Agreement - Buyer shall enter into a contract with Seller under Seller's applicable standard form of Service Agreement, provided, however, that a contract between Seller and Buyer which was in effect on August 1, 1954 or such other date on which this Tariff becomes effective shall remain in effect and shall be considered as an executed Service Agreement to the extent that its provisions are not superseded by or in conflict with the rate schedules and General Terms and Conditions of this Tariff.

13.2 Term of Agreement - The period of time to be covered by the executed Service Agreement shall be determined by agreement between Seller and Buyer but shall not exceed 25 years.

13.3 Modification - No modification of the terms and provisions of an executed service Agreement (other than Exhibits as provided for therein) shall be made except by the execution of a new Service Agreement.

13.4 Waiver of Defaults - No waiver by either party of any one or more defaults by the other in the performance of any provisions of the Service Agreement between Buyer and Seller shall operate or be construed as a waiver of any other default or defaults, whether of a like or of a different character.

14. DULY CONSTITUTED AUTHORITIES

This Tariff and any Service Agreement thereunder, is expressly made subject to all present or future valid rules, regulations or orders of any commission or regulatory body having jurisdiction.

GENERAL TERMS AND CONDITIONS
(Continued)

15. NOTIFICATION OF CHANGE OF DAILY REQUIREMENTS

Buyer and Seller will notify each other from time to time as necessary of expected changes in the rates of daily delivery or takings of gas hereunder or in the pressures or other operating conditions and the reasons for such expected changes as soon as such reasons come to the knowledge of either Buyer or Seller to the end that the other may be prepared to meet or to take advantage of such expected changes when, as and if they occur.

16. MAXIMUM DAILY DELIVERY OBLIGATION

Upon execution of a standard form of Service Agreement as contained in this FPC Gas Tariff the maximum daily delivery of gas required shall be designated which shall constitute and limit Seller's daily obligation to deliver in accordance with the provisions of the executed Service Agreement. Such maximum daily delivery obligation may not be modified except by execution of a new Service Agreement.

17. DESCRIPTIVE HEADINGS

The descriptive headings of the provisions of this Gas Tariff are formulated and used for convenience only and shall not be deemed to affect the meaning or construction of any such provisions.

DEFENDANT'S EXHIBIT NO. 7.

United States of America

Federal Power Commission

Commissioners: Leland Olds, Chairman, Claude L. Draper, Basil Manly, John W. Scott and Clyde L. Seavey.

February 12, 1941

In the Matter of:

United Gas Pipe Line Company.

Order Allowing Rate Schedules to Take Effect.

It appearing to the Commission that:

(a) On January 3, 1941, United Gas Pipe Line Company filed with the Federal Power Commission a contract dated November 22, 1940, with Tyler Gas Service Company, designated as United Gas Pipe Line Company Rate Schedule FPC No. 42, and Supplement No. 1 thereto, providing for sale and delivery of natural gas by United Gas Pipe Line Company to Tyler Gas Service Company;

(b) By the terms of said agreement it is to take effect as of November 5, 1940, and United Gas Pipe Line Company has requested that it be allowed to take effect as of that date;

(c) Good cause has been shown for allowing United Gas Pipe Line Company Rate Schedule No. 42, and Supplement No. 1 thereto, to take effect as of November 5, 1940;

The Commission orders that:

(A) The said Rate Schedules as contained in the agreement of November 22, 1940, between the United Gas Pipe Line Company and Tyler Gas Service Company, as filed

with the Commission on January 3, 1941, designated in the files of the Commission as United Gas Pipe Line Company Rate Schedule FPC No. 42, and Supplement No. 1 thereto, be and they are hereby allowed to take effect as of November 5, 1940;

(B) Said Rate Schedules shall be deemed to have been filed and published in compliance with the Natural Gas Act;

(C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7(b) of the Natural Gas Act; nor shall it be construed as constituting approval by this Commission of any rate, provision, or condition contained in the contract referred to herein;

(D) This order is without prejudice to any findings or order which may be made by the Commission in any proceeding now pending or hereafter instituted against United Gas Pipe Line Company.

By the Commission.

LEON M. FUQUAY,
(Leon M. Fuquay);
Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Dale E. Doty, Claude L. Draper and Nelson Lee Smith.

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

In the Matters of

UNITED GAS PIPE LINE COMPANY

Order Suspending Proposed Rate Schedules, Permitting Proposed Rate Schedules to Become Effective on Thirty Days' Notice Pending Hearing, Consolidating Proceedings, and Fixing Date of Hearing

On June 24, 1953, United Gas Pipe Line Company (United) tendered for filing its First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39 to its FPC Gas Tariff, Original Volume No. 1, containing increased rates and charges for certain town-border sales, proposed to be made effective as of July 15, 1953.

The increased rates and charges would result in an estimated increase of $1,691,000 per year based on actual sales for the calendar year 1952, or $1,778,000 based on estimated sales for the year 1953, in the rates and charges presently on file with the Commission in United's tariff.

From the data filed by United the increased rates and charges provided in said proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, Second Revised Sheets Nos. 23, 31 and 39, as tendered for filing on June 24, 1953, have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful. By reason

of the proviso of Section 4(e) of the Natural Gas Act,[1] however, the proposed increase in rates reflected in First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39, are subject to investigation in these proceedings and such revision as may be appropriate after hearing, but are not subject to suspension. Since good cause has not been shown by United for the requested effective date of July 15, 1953, as required by Section 4(d),

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First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 can only be permitted to become effective on July 25, 1953, *i.e.*, upon thirty days' notice as provided in Section 4(d).

The rates and charges proposed to be increased by United are among the rates and charges which are the subject of the consolidated proceedings in *In the Matters of United Gas Pipe Line Company*, Docket Nos. G-1142, G-1508, G-2019, and G-2074. These proceedings are in recess until July 20, 1953, at which time United is to complete its case-in-chief in those proceedings.

The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capital, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Dockets Nos. G-1142, G-1508, G-2019, and G-2074.

It appears appropriate and desirable to consolidate the proposed application filed on June 24, 1953, for an increase in rates with the proceedings in the consolidated Dockets Nos. G-1142, G-1508, G-2019, and G-2074 so that the common

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[1] "*Provided*, That the Commission shall not have authority to suspend the rate, charge, classification or service for the sale of natural gas for resale for industrial use only."

issues raised by these various proceedings may be heard together.

By letter of June 26, 1953, customers of United and interested State commissions were invited to make comments in regard to the rate increase application filed June 24, 1953. Comments were received from the Alabama Public Service Commission, the cities of Tyler, Texas, and Bastrop, Louisiana, and six customers. Generally, objections were made to the proposed rate increase. No comment was received from United Gas Corporation which is the principal town-border customer and the parent company of United.

The Commission *finds*:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act and good cause exists for the Commission to enter upon a hearing on July 20, 1953, pursuant to the authority contained in Section 4 of such Act, concerning the lawfulness of United's FPC Gas Tariff, Original Volume No. 1, as proposed to be amended by First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39, and what said proposed sheets, with the exception of First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39, be suspended as hereinafter provided and the use thereof deferred pending hearing and decision thereon.

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(2) Good cause has not been shown for waiver of the 30 days' notice requirement of Section 4(d) of the Natural Gas Act with respect to First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39.

(3) Good cause exists for further consolidating the proceeding involving the proposed increased rates and charges contained in the proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39 with the proceedings in consolidated Dockets Nos. G-1142, G-1508, G-2019, and G-2074.

(4) Good cause exists for fixing the date of hearing less than fifteen days after publication of this order in the Federal Register.

(5) It is necessary and appropriate to carry out the provisions of the Natural Gas Act, and it is in the public interest that the procedure hereinafter prescribed shall be followed at the hearing in order to conduct these proceedings with reasonable dispatch.

The Commission *orders*:

(A) A public hearing be held at 10:00 a.m. (EDST) on July 20, 1953, in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D. C., concerning the lawfulness of the rates, charges, classifications, and service, subject to the jurisdiction of the Commission, as set forth in United's FPC Gas Tariff, Original Volume No. 1, as proposed to be amended by the revised sheets described in Paragraph (B) hereof.

(B) The proceeding in Docket No. G-2210, involving United's First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31 and 39, and the proceedings in Dockets Nos. G-1142, G-1508, G-2019, and G-2074 be and they hereby are consolidated for purpose of hearing.

(C) Pending such hearing and decision thereon, United First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 118, 119, and 120, and Second Revised Sheet No. 23, to its FPC Gas Tariff, Original Volume No. 1, be and the same are hereby suspended and the use thereof deferred until December 25, 1953, unless otherwise ordered by the Commission, and until such further time thereafter as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.

(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953.

(E) At the hearing United shall go forward first and shall present and complete its case-in-chief with respect to its FPC Gas Tariff, as amended by the revised sheets set forth in Paragraph (B) above, before cross-examination is undertaken of United's presentations in the consolidated proceedings.

(F) Interested State commissions may participate as provided by Section 1.8 and 1.37(f) [18 CFR 1.8 and 1.37(f)] of the Commission's Rules of Practice and Procedure.

By the Commission.

LEON M. FUQUAY,
Secretary.

Adopted: July 10, 1953
Issued: July 10, 1953

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

In the Matter of

UNITED GAS PIPE LINE COMPANY

Petition for Intervention

Comes now Tyler Gas Service Company of Tyler, Texas (Tyler Gas) and petitions to intervene in the above styled proceedings pursuant to Section 1.8 of the Rules of Practice and Procedure. In support of this Petition, Tyler Gas states as follows:

1. Tyler Gas sells and distributes natural gas to industrial, commercial and domestic consumers in the City of Tyler, Texas and its suburbs.

2. Tyler Gas presently purchases all of its requirements from United Gas Pipe Line Company (United) under rate schedules set out in United's Tariff, Original Volume No. 1, Sheet 19 and First Revised Sheet 37. By its filing of June 24, 1953, United proposes to increase the rates to Tyler Gas under proposed schedules set out in First Revised Sheet 16 and Second Revised Sheet 31, from 11.2 cents to 18 cents per Mcf and from 7.5 cents to 13 cents per Mcf, respectively.

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3. By Order issued July 10, 1953, the Commission has suspended the schedule set out in First Revised Sheet 16 and deferred its use until December 25, 1953, and ordered a hearing to be held concerning the lawfulness of said schedule and the schedule set out in Second Revised Sheet 31, stating that the rates proposed in said schedules "may be unjust or unreasonable or otherwise unlawful," and

that they raise issues of "cost of service, allocation, . . . jurisdiction, and discrimination among others."

4. It is the position of Tyler Gas that the proposed rate increases are in violation of the obligations of United under contracts among it, Tyler Gas and the City of Tyler, Texas, that the rates for sales of gas by United to Tyler are beyond the jurisdiction of this Commission under Section 1(b) of the Natural Gas Act and that the proposed increases are unjust, unreasonable and unduly discriminatory to Tyler Gas.

WHEREFORE, your petitioner prays that it be permitted to intervene in the above styled proceedings with the right to have notice of and to appear at all hearings, to produce oral and written evidence, to cross-examine witnesses and to be heard by counsel on brief and oral argument.

Respectfully submitted,

BRYCE REA, JR.
317 Wyatt Building
Washington 5, D. C.
Attorney for Tyler Gas Service Company

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WASHINGTON
DISTRICT OF COLUMBIA } ss

Bryce Rea, Jr., being first duly sworn according to law says that he is attorney for Tyler Gas Service Company, that he has read the foregoing Petition and is familiar with the contents thereof, that he has executed the same for and on behalf of said company with full power and

authority to do so, and that the facts set forth therein are true to the best of his knowledge, information and belief.

s/ Bryce Rea, Jr.
Bryce Rea, Jr.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 16th day of July, 1953.

/s/ Lois A. Hendrick
Lois A. Hendrick

My Commission expires April 15, 1955.

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210

In the Matter of

United Gas Pipe Line Company

Notice of Intervention of City of Tyler, Texas

Comes now the City of Tyler, Texas and serves notice pursuant to Section 1.8 of the Rules of Practice and Procedure of the Federal Power Commission of its intervention in the above styled proceedings, and states as follows:

1. The City of Tyler, pursuant to an ordinance duly passed and approved by a majority of the qualified voters in the City in an election held for that purpose, has enfranchised Tyler Gas Service Company to sell and distribute gas to domestic, commercial and industrial consumers in the City of Tyler at rates, the levels of which are fixed pursuant to the ordinance granting the franchise

and are subject to the regulatory jurisdiction of the City of Tyler under the laws of the State of Texas.

2. Tyler Gas Service Company presently purchases all of its requirements to serve its purchasers in the City of Tyler from United Gas Pipe Line Company under rate schedules set out in United's Tariff, Original Volume No. 1, Sheet 19 and First Revised Sheet 37, which rate schedules United, by its filing of June 24, 1953, proposes to replace with higher rate schedules set out in First Revised Sheet 16 and Second Revised Sheet 31.

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3. By order issued July 10, 1953, the Commission suspended the use by United of the schedules in First Revised Sheet 16 of its filing until December 25, 1953, and ordered a hearing concerning the lawfulness of said schedules to be convened on July 20, 1953. At the close of the hearing on that day the proceedings were adjourned until further order of the Commission. No order reconvening them has been issued to date.

4. In support of the filing of this Notice of Intervention at this time, the City of Tyler submits as follows: (a) It was not apprised of the filing by United, nor, except constructively by notice in the Federal Register, of the Order of Suspension of the Commission. In any event, since that Order was issued July 10, 1953 and convened a hearing on July 20, 1953, it would have been physically impossible for the City of Tyler to comply with Rule 1.8(d) of the Rules of Practice and Procedure requiring notices of intervention to be filed not less than ten days before the date set for the commencement of the hearing (b) The time required under the rules and procedure governing the taking by the City of Tyler of official action such as the filing of this Notice of Intervention is such that the City of Tyler could not have filed this Notice before July 20, 1953. (c) In

view of the facts that there has been only one day of hearing since the Order of Suspension of July 10, 1953 and no date has been set for further hearings, neither the Commission, the Trial Examiner, United, nor any other party to these proceedings will be prejudiced by the acceptance of this Notice of Intervention for filing and the participation of the City of Tyler in future hearings.

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WHEREFORE the City of Tyler prays that this Notice of Intervention be accepted for filing and that the City of Tyler be permitted to participate fully in further proceedings as a party thereto.

Respectfully submitted,

/s/ BRYCE REA, JR.
Bryce Rea, Jr.

/s/ TROY SMITH

Attorneys for City of Tyler, Texas

WASHINGTON
DISTRICT OF COLUMBIA } ss

Bryce Rea, Jr., being first duly sworn according to law says that he is attorney for the City of Tyler, Texas, that he has read the foregoing Notice of Intervention and is familiar with the contents thereof, that he has executed the same for and on behalf of the City of Tyler with full power and authority to do so, and that the facts set forth therein are true to the best of his knowledge, information and belief.

/s/ BRYCE REA, JR.
Bryce Rea, Jr.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 6th day of October, 1953.

/s/ LOIS A. HENDRICK
Notary Public

My Commission expires April 15, 1955.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, G-2220 and G-2378

In the Matters of

UNITED GAS PIPE LINE COMPANY

Opinion No. 277

Opinion and Order Approving Proposed Rates and Providing for Further Hearings

These are consolidated rate proceedings involving all the rates and charges for the sale or transportation of natural gas by United Gas Pipe Line Company (United) subject to the jurisdiction of the Commission. The record herein has been certified to us for consideration of a proposed settlement as stated on the record by Staff Counsel in open hearing.

The proceeding at Docket No. G-1142 is an investigation of United's rates and charges for the transportation or sale of natural gas for resale, subject to the jurisdiction of the

Commission, initiated by the Commission by order of October 12, 1948, pursuant to Section 5(a) of the Natural Gas Act, in order to determine whether such rates and charges are just and reasonable, and if after hearing, they are found to be unjust and unreasonable, to fix just and reasonable rates and charges.

The proceeding at Docket No. G-1508 arose on an order of the Commission issued October 16, 1950, requiring United to file on or before

January 2, 1951, a restatement of its effective rates, charges, classifications, practices, regulations and contracts for the transportation or sale of natural gas for resale, subject to the jurisdiction of the Commission, in the form required by Order No. 144, issued October 30, 1948, amending Part 154 of the General Rules and Regulations governing the form, composition, filing and posting of rate schedules and tariffs. By order issued November 30, 1950, the proceeding at Docket No. G-1508 was consolidated with that at Docket No. G-1142.

On July 3, 1952, United filed at Docket No. G-2019, its conversion tariff designated United's FPC Gas Tariff, Original Volumes Nos. 1 and 2. Such filing amounted to substantial compliance with the requirements of Order No. 144 and the Commission's show cause order at Docket No. G-1508. It appears, therefore, that for the purposes of the settlement of these proceedings the issues involved at Docket No. G-1508 must be considered satisfied and the proceedings therein terminated.

Additionally, Docket No. G-2019 is a proceeding with respect to a proposed increase in rates and charges by United to five natural-gas companies amounting to approximately $9,500,000 annually, based on estimated sales for

the twelve-month period ending April 30, 1953.[1] The rates proposed to be increased are those included in Rate Schedules PL-3, T-1, T-2, and T-3.

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The Commission, by order issued August 1, 1952, at Docket No. G-2019, pursuant to the authority of Section 4(e) of the Act, suspended United's proposed rate schedules PL-3, T-1, T-2, and T-3, and certain proposed notices of cancellation of rates schedules United asserted were no longer subject to the jurisdiction of the Commission, deferring their use until January 3, 1953, and until such further time as such schedules and cancellation notices might be made effective in the manner prescribed by the Act. Other provisions of the conversion tariff not related to the proposed increases or cancellation notices were permitted to become effective as of August 3, 1952.

On September 16, 1952, United filed First Revised Sheets Nos. 14 and 15 to its FPC Gas Tariff, Original Volume No. 1, proposing a rate increase of approximately $131,258 annually, to United Gas Corporation, its parent, for resale in fifteen communities located in northwest Mississippi, based upon estimated sales for the year ending September 1953. The Commission, by order issued October 15, 1952, at Docket No. G-2074, pursuant to Section 4(e) of the Act, suspended such proposed increase until March 17, 1953, and consolidated the proceeding upon the proposed increases at Docket No. G-2019 with that at Docket No. G-2074. Subsequently, by order issued November 26, 1952, the Commission consolidated the two suspension proceedings at Docket Nos. G-2019 and G-2074, with the rate investigation

[1] The five companies are Mississippi River Fuel Corporation, Southern Natural Gas Company, Tennessee Gas Transmission Company, Texas Gas Transmission Corporation, and Texas Eastern Transmission Corporation.

proceeding at Docket No. G-1142 and the show-cause proceeding at Docket No. G-1508.

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On June 24, 1953, United filed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120, and Second Revised Sheets Nos. 23, 31, and 39 to its FPC Gas Tariff, Original Volume No. 1, containing proposed increased rates and charges for certain town-border sales of $1,778,000 annually based on estimated sales for the year 1953. The Commission, by order issued July 10, 1953, at Docket No. G-2210, pursuant to Section 4(e) of the Act, suspended the effectiveness of the proposed increases until December 25, 1953, except those contained in First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 applicable to sales for resale for industrial use only which were permitted to take effect as of July 25, 1953, by reason of the proviso of Section 4(e).[2] By the same order the Commission consolidated the proceeding upon the rate increases at Docket No. G-2210 with the proceedings at Docket Nos. G-1142, G-1508, G-2019, and G-2074.

On June 30, 1953, United filed First Revised Sheets Nos. 11-A and 28-A to its FPC Gas Tariff, Original Volume No. 1, proposing to cancel its Rate Schedules DG-4J and G-4J as filed on June 29, 1953, in compliance with the Commission's Opinion No. 252 and accompanying order issued June 1, 1953, *In the Matter of Willmut Gas & Oil Company, et al.*, v. *United Gas Pipe Line Company,* Docket No. G-1158. The purpose of the

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June 30, 1953, filing was to eliminate the rate made available to Willmut Gas & Oil Company by compliance with the

[2] The proviso of Section 4(e) referred to, specifies: "That the Commission shall not have authority to suspend the rate, charge, classification or service for the sale of natural gas for resale for industrial use only."

June 1, 1953 order at Docket No. G-1158 and to make effective as to Wilmut Gas & Oil Company the increased rates and charges contained in Rate Schedules DG-J and G-J filed at Docket No. G-2210. The Commission, by order issued July 31, 1953, at Docket No. G-2220, pursuant to Section 4(e) of the Act, suspended the effectiveness of United's First Revised Sheets Nos. 11-A and 28-A until January 1, 1954, and consolidated the proceeding upon the proposed cancellations at Docket No. G-2220 with the proceedings theretofore consolidated at Docket Nos. G-1142, G-1508, G-2019, G-2074, and G-2210.

By order issued October 22, 1953, at Docket No. G-2074, the Commission permitted United to file Second Revised Sheet No. 14 and Original Sheets Nos. 40-A and 40-B to its FPC Gas Tariff, Original Volume No. 1, to be effective as of July 28, 1953, in substitution for the sheets previously suspended in that proceeding by order issued October 15, 1952. The substitution reflected a reduction in the amount of the increase proposed by United to United Gas Corporation at Docket No. G-2074 from $131,258 to approximately $18,000 annually.

On January 25, 1954, United filed two service agreements with Arkansas Louisiana Gas Company proposing an increase in rates and charges of approximately $347,000, or 45%, per year, based on estimated sales for 1954. The rates and charges to Arkansas Louisiana Gas Company proposed to be increased by United were contained in United's Rate Schedule FPC

No. 69, and supplements thereto, which was the subject of a proposed notice of cancellation filed by United at Docket No. G-2019 on the ground that its sale to Arkansas Louisiana Gas Company was not subject to the Commission's jurisdiction. As noted previously, the aforesaid notice of

cancellation of Rate Schedule FPC No. 69 had been suspended until January 3, 1953, and until such further time as it might be made effective in the manner prescribed by the Act. At the date of the filing of the proposed increase to Arkansas Louisiana Gas Company the cancellation of Rate Schedule FPC No. 69 was under suspension. Concurrently with the filing of the proposed increase, United requested permission to withdraw its notice of cancellation of Rate Schedule FPC No. 69. The Commission, by order issued March 1, 1954, at Docket No. G-2378, pursuant to Section 4(e) of the Act, suspended the effectiveness of the proposed service agreements until August 1, 1954, and also allowed the withdrawal of the notice of cancellation of Rate Schedule FPC No. 69. Additionally, the Commission consolidated the proceeding upon the rates increase at Docket No. G-2378 with the proceedings at Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, and G-2220.

By orders issued January 14, 1953, at Docket No. G-2019 and April 1, 1953, at Docket No. G-2074, the Commission permitted, upon motions filed by United, the respective rate increases in those proceedings to become effective, under bond and subject to refund, as of January 3 and March 17, 1953, respectively. As noted previously, the reduced increase at Docket No. G-2074 became effective as of July 28, 1953, by order issued therein

on October 22, 1953. Subsequently, by orders issued January 25, 1954, at Docket Nos. G-2210 and G-2220 and August 16, 1954, at Docket No. G-2378, the Commission permitted, upon motions filed by United, the respective rate increases in those proceedings to become effective, under an undertaking and subject to refund, as of December 25, 1953, January 1, and August 1, 1954, respectively. Thus, all the increased rates proposed by United in these various pro-

ceedings are currently contingently effective under bond or undertaking and subject to refund.

By various orders of the Commission a number of persons, mainly customers of United, have been permitted to intervene in one or more of these consolidated proceedings. They include Willmut Gas & Oil Company (Willmut), Mississippi River Fuel Corporation (Mississippi), Southern Natural Gas Company (Southern), Texas Eastern Transmission Corporation (Texas Eastern), Tennessee Gas Transmission Company (Tennessee), Texas Gas Transmission Corporation (Texas Gas), Tyler Gas Service Company (Tyler Gas), Mobile Gas Service Corporation (Mobile), and Mississippi Valley Gas Company (MVG), which are customers of United. Also, Louisiana Public Service Commission and the Alabama Public Service Commission. The City of Tyler, Texas (Tyler), also filed a notice of intervention. And Memphis Light, Gas & Water Division, City of Memphis, Tennessee, (Memphis), which is a customer of Texas Gas which in turn buys gas from United, was also permitted to intervene.

As noted above the various proceedings were consolidated from time to time for purposes of hearing. Hearings were first held in March of

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1953. Subsequently, other hearings were held in June and July, 1953, and in March, 1954. At such hearings all parties of record, including the interveners and Staff Counsel, had full opportunity to participate and to conduct as much of their cross-examination as they were then prepared to undertake, pursuant to the procedure specified in the order issued November 26, 1952, herein.

Following the recessing of the hearings on March 25, 1954, representatives of United and of the Staff conferred from time to time during the period April through August

1954, for the purpose of checking and rectifying differences resulting from the Staff's examination of the books and records of United. When the hearings resumed on August 11, 1954, the other parties were apprised of the conferences held between representatives of United and of the Staff. Thereupon, Staff Counsel moved that the hearings be recessed in order to afford the parties to these proceedings an opportunity to confer with respect to the facts and figures developed by the Staff in its examination of the books and records of United. Conferences were held on August 11 through 13, inclusive, and on August 16, 1954. At such conferences, which were attended by all parties to the proceedings except the Louisiana Public Service Commission and Memphis, the cost of service for the year 1952 adjusted, allocation, and resulting rates tentatively agreed upon by representatives of United and the Staff, were presented to the parties as Documents A through D, inclusive. After full discussion, the hearings, which had been recessed from day to day during the conferences, were resumed on

August 17, 1954, at which time Documents A through D, inclusive, as modified in conference, were received in evidence as Exhibit Nos. 77 through 80.

The terms of the proposed settlement have been agreed to by all parties, except Mississippi. Tyler and Tyler Gas have stated on the record their qualified acceptance of the terms of the proposed settlement subject to the outcome of litigation now pending in the United States Court of Appeals for the Fifth Circuit concerning the legality of United's filing at Docket No. G-2210 so far as it relates to sales to Tyler Gas. Mobile stated on the record its approval of the settlement terms relating to the sale of natural gas to Mobile for domestic, commercial and other uses. Mobile expressly reserved from approval United's

rates to Mobile for resale for industrial use only to Ideal Cement Company. Mobile states its exception of approval of such rate on the ground that the United States Court of Appeals for the Third Circuit held, in an opinion filed September 7, 1954, that United's proposed increase of rates and charges to Mobile for resale to Ideal Cement Company should be rejected.

Pursuant to order issued August 19, 1954, oral argument was had before the Commission on September 9, 1954, in Washington, D. C., concerning the matters involved and issues presented by the proposed settlement. All parties to the proceedings participated in the oral argument save Louisiana Public Service Commission, MVG, and Memphis. Previously, however, the latter two had signified their assent to the pro-

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posed settlement. At the oral argument the parties adhered to their position as expressed upon the record prior to argument except that Mississippi River Fuel Corporation advanced a counter proposal designed to coincide with the views expressed by its president upon the record and yet grant to United substantially the same amount of dollars which it would obtain under the proposed settlement. Thus, these proceedings are before us for disposition upon the proposed settlement and consideration of the counter proposal submitted by Mississippi River Fuel Corporation which was rejected by all customers affected by it.

United is a "natural-gas company" within the meaning of the Act as heretofore found by the Commission in its order of November 10, 1942, *In the Matter of United Gas Pipe Line Company*, Docket No. G-232, 3 F.P.C. 863. It is engaged in the transportation and sale for resale of natural gas in interstate commerce. It transports by means of its integrated pipe-line system natural gas produced from fields in Texas, Louisiana, and Mississippi and delivers and

sells it to industrials, other pipelines, and distribution companies in the foregoing States and also in Alabama and Florida.

On the basis of the 1952 test year, as adjusted, and the sales volumes used for such test period, the increase in rates and charges under the suspended rates to jurisdictional business amounts to $10,370,280. The rates provided in the proposed settlement produce charges of $6,171,386 less than sought by United by its various filings at Docket Nos. G-2019, G-2074, G-2210, G-2220, and G-2378.

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The basis of the settlement is reflected in Exhibits Nos. 77, 78, 79, and 80, which are of record in these proceedings. These exhibits were prepared after an extensive field examination of the books, records and operations of United by representatives of the Staff. Exhibit No. 77 (page 1) shows a total rate base investment developed by the Staff for the test year of $291,406,069 with no allowance for working capital because of available income tax accruals, and adjusted to reflect the elimination of $9,282,553 in Account 100.5, Gas Plant Acquisition Adjustments. Total rate base investment developed by the Staff is $21,361,748 less than urged by United for the test year, due primarily to differences in working capital, Account 100.5, and gross plant in service. United has agreed to a rate of return of 6%, which, when applied to the total rate base determined by the Staff, results in a return of $17,484,364. Previously, United had contended for a rate of return of 6¾% on the record, or an allowance of $21,111,828 based on its determination of total rate base investment for the test year of $312,767,817.

The Staff, as a result of its investigation of United's operations for the test period, developed a cost of service of $143,628,905.23, including return at 6%. This cost of service reflected various adjustments proposed by the

Staff amounting to a net reduction of $14,013,864. Principally, the difference between the cost of service determined by United and by the Staff is accounted for by adjustments for purchased gas, depreciation, amortization of Gas Plant Acquisition Adjustment, taxes, and return, all as shown on page 2 of Exhibit No. 77.

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For the reason that not all of United's sales are subject to the Commission's jurisdiction it was necessary to make an allocation of cost of service to determine the costs to be borne by the jurisdictional business. The United system is divided into nine operating districts, designated as the San Antonio, Houston, Beaumont, Southwest Louisiana, New Orleans, Dallas, Shreveport, Monroe, and Jackson districts, all as shown in Exhibit No. 4. The New Orleans District is divided into New Orleans #5, which United conceives to be intrastate in nature; and New Orleans #6, which is interconnected with its interstate facilities. The Jackson District includes Northwest Mississippi which is not physically interconnected by existing gas transmission pipe lines. The sales and services rendered in United's so-called Northern Area, which includes the Dallas, Shreveport, Monroe, and Jackson districts are subject to the jurisdiction of this Commission. The sales and services rendered in United's so-called Southern area, which includes the San Antonio, Houston, Beaumont, Southwest Louisiana, and New Orleans districts are not subject to the jurisdiction of this Commission.

The allocation of the total cost of service as between districts and between sales from the production and transmission systems—subdivided in turn as between direct sales and sales for resale as well as pipe line and town border sales—and gas transported for others is shown in detail on Exhibit No. 78.

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It is clear from a study of the exhibit pertaining to the allocation of the cost of service that the allocation procedures recognize and

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follow the principles adopted by the Commission in its Opinion No. 225, *In the Matter of Atlantic Seaboard Corporation*, Docket No. G-1175, *et al*, issued April 25, 1952, and in its Opinion No. 228, *In the Matter of Northern Natural Gas Company*, Docket Nos. G-1382, *et al*, issued June 11, 1952.

Using the standard *Atlantic Seaboard* allocation procedures, the total cost of service in United's Northern area is found to be $74,412,222, exclusive of Northwest Mississippi. As indicated by page 1 of Exhibit 78, United's total revenues in the Northern Area under the rates and charges in effect immediately prior to the proposed increased rates in these consolidated proceedings amount to $70,353,224, or $4,058,998 less than the cost of service for the Northern Area. The amount of $4,058,998 represents then the deficiency in United's rates and charges and the amount which it would require in order to recover its cost of service for the Northern Area. A breakdown of the deficiency or excess for sales for resale from the transmission and production system as between pipe line and town border sales in the two rate zones in the Northern Area—as well as the deficiency in the transportation rates prior to January 3, 1953—is shown on lines 12 through 25 and column 7 of page 1 of Exhibit No. 78 and this allocation of cost of service has been agreed upon by all parties except Mississippi.

Rates designed to recoup the cost of service detailed in Exhibit No. 78 as to each classification of service in the particular rate zones are shown in Exhibit No. 79. A comparison of the rates presently in effect, either under bond

or undertaking and subject to refund, and the proposed settlement rates may be summarized as follows:

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SALES TO PIPE-LINE COMPANIES

	Central Zone[3]			Jackson Zone		
	Present	Settlement		Present	Settlement	
Firm Service						
Designation	PL3	PL4	PL2	PL-C	PL1	PL-J
Demand Charge	$0.65	$ 0.96	$ 1.30	$0.75	$ 1.30	$1.03
Commodity Charge	9.0¢	11.6¢	12.5¢	10¢	12.5¢	12¢
Emergency Service						
Designation		PLE		PLE-C	PLE	PLE-J
Commodity Charge		16.77¢		12.5¢	16.77¢	15.4¢

TRANSPORTATION
(All Central Rate Zone)

	Present			Settlement		
Designation	T1	T2	T3	T1	T2	T3
Demand Charge	$0.79	$0.182	$0.79	$0.60	$0.25	$0.60
Commodity Charge	1¢	1¢	1¢	—	—	—

TOWN BORDER

	Central Zone			Jackson Zone		North West Mississippi Zone	
	Present	Settlement		Present	Settlement	Present	Settlement
Small General Service	(3,000 Mcf per day or under)						
Designation	G-C	G-B	G-C	G-J	G-J	G-NW	G-NW
Comm. Chg.	18¢	17¢	16¢	24¢	19¢	42.5¢	41¢
Large General Service							
Designation	DG-C	DG-B	DG-C	DG-J	DG-J	None	DG-NW
1st Block[4]	20¢	15¢	17¢	25¢	20¢	—	46¢
2nd Block	12.5¢	10¢	12.5¢	16.5¢	15¢	—	30¢
Large Volume Industrial for Resale							
Designation	IND-C		IND-C	IND-J	IND-J	IND-NW	None
Commodity	13¢		12.5¢	14.5¢	14.5¢	33.5¢	—

[3] The Central Zone includes the Dallas, Shreveport, and Monroe districts.

[4] 1st Block rate is applicable to all gas delivered during the billing month up to that number of Mcf obtained by multiplying the billing demand for the month by 8. The second block rate is applicable to all gas delivered during the billing month in excess of the gas billed at the first block rate.

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A comparison of the impact of such proposed settlement rates and the rates presently in effect, either under bond or undertaking, and subject to refund, may be summarized as follows:

NORTHERN AREA
Excluding NW Mississippi
1952 Adjusted

Customer or Class of Service	Revenues under Present Settlement Rates	Revenues under Settlement Rates	Decrease under Settlement Rates	Percent Decrease
PIPE-LINE COMPANIES				
Mississippi River Fuel Corp.				
Central Rate Zone	$15,503,388	$14,554,978	$ 948,410	6.1%
Southern Natural Gas Co.				
Central Rate Zone	2,653,177	2,972,864	319,687 (I)	
Jackson Rate Zone	4,845,000	4,426,429	418,571	
Total Southern	7,498,177	7,399,293	98,884	1.3
Texas Eastern Trans. Corp.				
Central Rate Zone	5,800,847	6,492,850	692,003 (I)	
Jackson Rate Zone	23,249,050	21,485,662	1,763,388	
Total Texas Eastern	29,049,897	27,978,512	1,071,385	3.7
Texas Gas Trans. Corp.				
Central Rate Zone	9,224,980	7,809,175	1,415,805	15.3
Total Pipeline Companies	$61,276,442	$57,741,958	$3,534,484	5.8%
TRANSPORTATION, Total				
Central Rate Zone	$ 2,744,836	$ 1,510,272	$1,234,564	45.0%
TOWN BORDER				
Central Rate Zone	$ 3,981,685	$ 3,588,177	$ 393,508	9.9%
Jackson Rate Zone	12,720,539	11,711,709	1,008,830	7.9
Total	$16,702,224	$15,299,886	$1,402,338	
GRAND TOTAL	$80,723,502	$74,552,116	$6,171,386	7.6%

(I) Indicates increase.

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Exhibit No. 79 clearly shows that the proposed settlement rates will generate annual revenues to United from sales and service in the Northern Area in an amount of $74,-

552,116, which is an increase of $4,198,894 over the revenues which would have been generated under the rates in effect immediately prior to the effective dates of the increased rates filed in these consolidated proceedings. Such revenues, however, are $6,171,386 less yearly than the revenues which would be generated under the increased rates filed by United, and which rates its customers are presently paying subject to refund.

Exhibit No. 80 constitutes the FPC Gas Tariff which United would file to effectuate the terms of settlement. Pursuant to the terms of the settlement, United proposes to file its FPC Gas Tariff, First Revised Volume No. 1, to take effect as of August 1, 1954. Such revised volume would supersede United's present tariff and would reflect the terms of the proposed settlement. Such tariff is to be filed in the event the Commission approves the proposed settlement.

In addition, the parties supporting the proposed settlement have agreed that the refund due any customer in these consolidated proceedings will be equal to the difference between (a) the amounts actually billed by United under the applicable increased rate filed by it at Docket Nos. G-2019, G-2074, G-2210, and G-2220, which were suspended by orders of the Commission and which are currently contingently effective, and (b) the amounts which would have been collected if such customers were billed (1) under the applicable proposed settlement rate, or

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(2) under the rates superseded by the increased rate filed by United in the consolidated proceedings, if such superseded rate is higher than the settlement rate, for the respective periods beginning with the effective date of the increased rates. No refund would be contemplated at Docket No. G-2378 in view of the fact that such increased

rate became effective on August 1, 1954, the date at which the proposed settlement rate would become effective.

In addition to the foregoing, the parties supporting the proposed settlement have agreed to the following:

(1) The rate investigation proceeding at Docket No. G-1142 will be dismissed and terminated, in the event the Commission enters an order approving the proposed settlement.

(2) The order to show cause at Docket No. G-1508 is now moot because United has filed its conversion tariff and the Commission has allowed it to become effective in part as of August 3, 1952, and in remainder part as of January 3, 1953, under bond and subject to refund. United will forthwith, upon acceptance of the proposed settlement, move to dismiss the suit filed by it on or about October 19, 1950, in the United States Court for the District of Columbia, Civil Action No. 4680-50 and styled *United Gas Pipe Line Company* v. *Federal Power Commission, et al.*

(3) United will move to withdraw certain proposed notices of cancellation with respect to certain sales which United

asserted were not subject to this Commission's jurisdiction. The proposed notices of cancellation to be withdrawn are listed in Part I of Appendix A to this order. The applicable town-border rate agreed upon by the parties will be the rate which United will charge these town-border customers on and after August 1, 1954.

(4) United will file with the Commission executed service agreements for certain town-border utility customers listed in Part II of Appendix A to this order. The

town-border rate which may be applicable to these particular customers will be effective on and after August 1, 1954.

(5) Certain proposed notices of cancellation filed by United at Docket No. G-2019 shall become effective as of January 3, 1953. The proposed notices of cancellations which are to become effective are listed in Part III of Appendix A to this order.

(6) Certain reservations be made that by agreeing to the proposed settlement neither United or the Commission's staff nor any other affected party is to be considered as agreeing with the methods used for determining cost of service, or with the principles underlying the results reflected in the proposed settlement.

(7) The proposed settlement will not prejudice the rights or contentions which any of the parties are asserting or may

assert in any proceeding now pending or arising in the future before this Commission.

(8) The parties will recommend the waiver of the necessary provisions of the Commission's General Regulations under the Natural Gas Act so far as to enable the proposed tariff (as exemplified by Exhibit No. 80) to become effective as of August 1, 1954.

(9) The settlement is conditioned upon the Commission's approval of the terms and conditions stated in the record.

As noted previously, Mobile, an intervener at Docket No. G-2210, expressly reserved from the settlement its pur-

chase of gas from United for resale for industrial use only to Ideal Cement Company. This reservation is based upon the decision of the United States Court of Appeals for the Third Circuit in *Mobile Gas Service Corporation* v. *Federal Power Commission*, F. 2d (1954).[5] The Court held that the contract entered into between Mobile and United for a stated period of years for the sale of gas by United to Mobile at a stated price for resale to the particular industrial consumer cannot be unilaterally set aside by a filing of a higher rate by United, but can be altered only if it should be first determined that the existing contract rate is unreasonable; and that the Commission erred in not rejecting United's Revised Sheets.

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Nos. 39 and 40 filed at Docket No. G-2210 in so far as they affected the Mobile-Ideal Cement Company contract.

Also, as noted previously, Tyler Gas and Tyler have accepted the proposed settlement with certain qualifications. These interveners at Docket No. G-2210 have stated that they do not object to the establishment of the rates proposed for sales by United in its Central Rate Zone except to the extent that their establishment is founded on the conclusion that such rates are lawful or just and reasonable for sales by United to Tyler Gas. Such interveners, proceeding on the theory that the rates provided in the existing contracts between United and Tyler Gas are binding upon United until set aside as unjust and unreasonable in a proceeding under Section 5 of the Act, instituted a suit in the District Court of the United States for the Eastern District of Texas, Tyler Division, in Civil Action No. 1662, styled *Tyler Gas Service Company et al.*

[5] The decision of the Court arose from a review of an order of the Commission issued December 7, 1953, *In the Matter of Mobile Gas Service Corporation*, Docket No. G-2227.

v. *United Gas Pipe Line Company*, to enjoin United from moving to put into effect rates filed at Docket No. G-2210 applicable to Tyler Gas. Upon dismissal of such action by the District Court, Tyler Gas and City of Tyler noted an appeal to the United States Court of Appeals for the Fifth Circuit. That appeal is now pending.

In view of the Mobile decision, we shall provide herein that the proceedings at Docket No. G-2210 remain open for the determination of what is a just and reasonable rate to be charged by United to Mobile for resale to Ideal Cement Company, following such time as the United States Court of Appeals for the Third Circuit's decision becomes final.

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Similarly, in view of the appeal noted by Tyler Gas and Tyler in the United States Court of Appeals for the Fifth Circuit and the allegations in their petitions to intervene, we shall provide that the proceedings at Docket No. G-2210 also remain open for the determination of the issues raised in said petitions to intervene by Tyler Gas and Tyler. Accordingly, the suspension of the rates and charges of United to Tyler Gas shall continue subject to the undertaking and refund, but we shall stay our orders at Docket No. G-2210 to the extent that Tyler Gas is required to pay more than the proposed settlement rates applicable to it.

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The settlement rates are recommended by the Commission staff after full investigation of United's books and records, accepted by United, and approved by all interveners except Mississippi. However, we will afford to Mississippi an opportunity to be fully heard on its claim that it has a right to separate rates as opposed to a rolled-in rate reflected in the settlement.

Because we find it to be fair and reasonable, we will approve the proposed settlement as to all other parties except Mississippi, as provided in the rate settlement, and require United to maintain its present schedule of rates applicable to sales to Mississippi as they now are and until further order of the Commission.

Our order will provide for prompt hearing as to Mississippi's right to separate rates as claimed, rather than a rolled-in rate for its total service.

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The Commission further *finds*:

(1) The proposed settlement of these rate proceedings on the basis heretofore described, subject to the terms and conditions hereinafter ordered, is appropriate and in the public interest in carrying out the provisions of the Natural Gas Act and should be approved and made effective as hereinafter provided and ordered.

(2) The rates and charges as contained in United's FPC Gas Tariff, Original Volume No. 1, as amended by its filings at Docket Nos. G-2019, G-2074, G-2210, G-2220, and G-2378, heretofore described, are not just, reasonable, or lawful under the terms and provisions of the Natural Gas Act and should be disallowed and denied, as hereinafter provided and ordered, except as to the rates and charges presently effective as to Mississippi with respect to which a further hearing should be provided.

(3) Good cause exists for the Commission to waive its applicable General Rules and Regulations to the extent that United's FPC Gas Tariff, First Revised Volume No. 1, in substantially the form of Exhibit No. 80, with the exceptions heretofore noted for

Mississippi, may be permitted to become effective as of August 1, 1954.

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The Commission *orders:*

(A) The increased rates and charges contained in United's FPC Gas Tariff, Original Volume No. 1, as amended by its filings at Docket Nos. G-2019, G-2074, G-2210, G-2220, and G-2378, heretofore described, be and the same are hereby disallowed and denied except insofar as such rates and charges are applicable to sales and services to Mississippi.

(B) Within 30 days after the date of issuance of this order United shall revise its FPC Gas Tariff, Original Volume No. 1, as to all sales and services rendered by it to its utility customers, except Mississippi, by filing, in a form satisfactory to the Commission, such new schedules of rates and charges for the sale and transportation of gas in interstate commerce and containing the rates set forth heretofore as being agreed-upon between the parties and to be effective on and after August 1, 1954 as are necessary to effectuate the settlement and the terms and conditions of this order.

(C) The provisions of the orders . . . issued at Docket No. G-2210 on July 10, 1953, and January 25, 1954, relating to Rate Schedules DG-C and G-C in so far as they are applicable to sales of natural gas to Tyler Gas shall continue in full

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force and effect until further orders of the Commission, *Provided, however,* That the effect of the order issued on January 25, 1954, at Docket No.

G-2210 be and is hereby stayed to the extent that it requires Tyler Gas to pay more than 17¢ per Mcf for gas purchased under the first block of Rate Schedule DG-C and more than 12.5¢ per Mcf under the second block thereof, and more than 16¢ per Mcf for all gas purchased under Rate Schedule G-C, all as provided in the settlement, pending determination of the issues raised by Tyler Gas and Tyler in their petitions to intervene; and *Provided further*, That Tyler Gas shall not be required to pay United more than 12.5¢ per Mcf for all gas purchased under Rate Schedule IND-C.

(D) Within 30 days from the date of issuance of this order, United shall refund to its customers, except Mississippi the difference between (a) the amounts actually billed by United under the applicable proposed increased rates filed by it at Docket Nos. G-2019, G-2074, G-2210, and G-2220, and (b) the amounts which would have been collected if such customers were billed (1) under the applicable proposed settlement rate, or (2) under the superseded rate in the various proceedings, if such superseded rate is higher that the settlement rate for the applicable period beginning with the effective date of the proposed increased rates, *i.e.*, January 3, 1953, in Docket No. G-2019,

July 28, 1953, in Docket No. G-2074, December 25, 1953, in Docket No. G-2210, and January 1, 1954 in Docket No. G-2220, all as heretofore described, together with interest at the rate of 6% per annum from the respective date of receipt of such excess amounts to the date of refund. United shall bear all costs incident to the making of such refund.

(E) Within 45 days from the date of issuance of this order, United shall report to the Commission, in writing and under oath, the details of its calculations resulting in the refund ordered pursuant to paragraph (D), together with a copy of releases from its customers with respect to such refund.

(F) The Commission reserves the right to reject all or any part of the revised tariff or tariff sheets to be filed by United to effectuate the settlement agreed upon by the parties supporting it, and in lieu thereof to prescribe by further order appropriate rates, charges, classifications, rules, regulations, and practices, consistent with the settlement agreement.

(G) In view of the claimed right by Mississippi to separate rates as opposed to the rolled-in rate reflected in the settlement, a public hearing be held on November 16, 1954, at 10:00 a.m. (EST) in a Hearing Room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C., concerning the issues raised by Mississippi respecting its right to separate rates and related issues.

(H) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) of the Commission's Rules of Practice and Procedure [18 CFR 1.8 and 1.37(f)].

(I) The rate investigation proceeding instituted by the Commission in Docket No. G-1142, as heretofore described, be and the same is hereby dismissed and terminated in all respects except in so far as it relates to the rates and charges applicable to Mississippi, Tyler Gas, and to Mobile for resale to Ideal Cement Company for industrial use.

(J) The show-cause proceeding in Docket No. G-1508, as heretofore described, be and it is hereby dismissed and terminated on grounds of mootness, and United shall within 30 days from the issuance of this order move to dismiss the suit filed by it on or about October 19, 1950, in the United States District Court for the District of Columbia, Civil Action No. 4680-50 and styled *United Gas Pipe Line Company v. Federal Power Commission, et al.*, and shall within 5 days from the issuance of an order by such Court thereon report to the Commission, in writing, under oath, the Court's action in that respect.

(K) United shall, within 30 days from issuance of this order, move to withdraw the proposed notices of cancellation involving those rate schedules listed under Part I to Appendix A to this order, covering sales and services subject to the jurisdiction of the Commission, all as heretofore described in

this order and in the statement of record, and United shall charge such customers the applicable town-border rate from and after August 1, 1954.

(L) United shall, within 30 days from issuance of this order, file with the Commission executed service agreements with the customers listed in Part II to Appendix A to this order, to cover sales and services subject to the jurisdiction of the Commission, all as heretofore described in this order and in the statement of record, and United shall charge such customers the applicable town-border rate from and after August 1, 1954.

(M) Suspension of United's proposed notices of cancellation filed on July 3, 1952, as they may have been

amended, and as listed in Part III to Appendix A to this order be and the same hereby is terminated; and said notices of cancellation be and the same hereby are allowed to become effective as of January 3, 1953.

(N) The rates and charges agreed upon by the parties for the sale of gas for industrial use only in the Jackson Rate Zone shall not be applicable to the sale of gas by United to Mobile for resale to Ideal Cement Company.

(O) The proceedings in Docket Nos. G-2019, G-2074, G-2210, G-2220, and G-2378 be and they are hereby terminated in all respects, except that (1) the proceedings in Docket No. G-2019 shall

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remain open for the determination of whether separate rates, rather than a rolled-in rate shall be applicable to Mississippi; and (2) the proceedings in Docket No. G-2210 shall remain open for the purpose of (a) determining what is the just and reasonable rate to be charged by United to Mobile for resale to Ideal Cement Company following such time as the decision of the United States Court of Appeals for the Third Circuit in the *Mobile* case shall become final, and (b) in view of the pending appeal of Tyler Gas and Tyler in the United States Court of Appeals for the Fifth Circuit, referred to previously, and their petitions to intervene in the proceedings in Docket No. G-2210, determining the matters involved and issues presented by the petitions to intervene of Tyler Gas and Tyler.

(P) United shall, over the signature of a responsible officer, file with the Commission, within 30 days from

the date of the issuance of this order, in writing and under oath, an original and 4 conformed copies of its acceptance of the terms and conditions of this order.

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(Q) This order is without prejudice to any findings or orders which have been or may hereafter be made by the Commission, and is without prejudice to any claims or contentions which may be made by the Commission, United, or any other affected party hereto, in any proceeding now pending or hereafter instituted by or against United or any other companies or persons.

By the Commission. Commissioner Stueck concurring in the result only.

LEON M. FUQUAY,
Secretary.

Adopted: October 26, 1954
Issued: November 2, 1954

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman, Claude L. Draper, Frederick Stueck and William R. Connole.

Docket No. G-9547

In the Matter of

UNITED GAS PIPE LINE COMPANY

Order Suspending Proposed Increases in Rates

United Gas Pipe Line Company (United), on September 30, 1955, tendered for filing First Revised Sheet Nos. 1, 4,

6, 8, 10, 12, 14, 16, 17; 17-A, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 30, 32, 99; 100, 101, 102, 103, 104, and revised Title Sheet, to its FPC Gas Tariff, First Revised Volume No. 1, and First Revised Sheet Nos. 54 and 57 to its FPC Gas Tariff, Original Volume No. 1 proposing to take effect as of November 1, 1955. By said filing United proposes a general rate increase to all of its sales for resale subject to the jurisdiction of the Commission, except transportation for others. Said increases is estimated to be approximately $9,978,000 per year based on a test year ending April 30, 1955, as adjusted, or an increase of approximately 14 per cent.

United bases part of its proposed rate increase on claimed increases in the cost of purchased gas. It does not appear that such increases in cost will occur in fact on November 1, 1955, nor can it now be determined the amount which United will actually incur. Additionally, United is claiming a rate of return of 6½ per cent, acquisition adjustment costs, an increased allowance for income taxes, and allocation of costs which do not appear to be justified. These, as well as other items of cost, have not been established and it appears that the increased rates and charges proposed in United's rate filing have not been shown to be justified, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful.

Alabama Public Service Commission as well as numerous customer companies of United request that the proposed rates be investigated and after suspension a hearing be held to determine just and reasonable rates.

The Commission *finds:*

It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a hearing concerning

the lawfulness of the rates proposed by United in its filing of September 30, 1955, and that the rates in the above-designated tariff sheets[1] be suspended and the use thereof deferred as hereinafter ordered.

The Commission *orders:*

(A) Pursuant to the authority contained in Sections 4, 5, and 15 of the Natural Gas Act and the Commission's General Rules and Regulations (18 CFR, Chapter I), a public hearing be held upon a date to be fixed by notice from the Secretary concerning the lawfulness of the rates and charges proposed by United in its filing of September 30, 1955; and, pending such hearing and decision thereon, First Revised Sheet Nos. 1, 4, 6, 8, 10, 12, 14, 21, 22, 23, 25, 26, 27, 28, 30, 32, 99, 100, 101, 102, 103, 104, and revised Title Sheet to its FPC Gas Tariff, First Revised Volume No. 1, and proposed First Revised Sheet, Nos. 54 and 57 to its FPC Gas Tariff, Original Volume No. 1, be and the same hereby are suspended and the use thereof deferred until April 1, 1956, and until such further time as they may be made effective in the manner prescribed by the Natural Gas Act.

(B) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) of the Commission's Rules of Practice and Procedure [18 CFR 1.8 and 1.37(f)].

By the Commission.

J. H. Gutride,
Acting Secretary.

Adopted: October 21, 1955
Issued: October 26, 1955

[1] First Revised Sheet Nos. 16, 17, 17-A, 18, 19, and 20 to First Revised Volume No. 1 pertain to sales of gas for resale for industrial use only and therefore may not be suspended pursuant to Section 4 of the Natural Gas Act.

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UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Docket No. G 9547

In the Matter of

UNITED GAS PIPE LINE COMPANY,
TYLER GAS SERVICE COMPANY
and
CITY OF TYLER, TEXAS

Petition of Tyler Gas Service Company and City of Tyler, Texas for Order of Federal Power Commission Rejecting Rate Filing of United Gas Pipe Line Company

Come now Tyler Gas Service and City of Tyler, Texas, pursuant to Rule 1.7 of the Rules of Practice and Procedure of the Federal Power Commission and file this their Petition for the issuance of an Order rejecting, insofar as they are proposed to be applied to sales of gas to Tyler Gas, First Revised Sheet No. 4 and First Revised Sheet No. 16 of F.P.C. Gas Tariff, First Revised Volume No. 1, filed September 30, 1955 to be effective November 1, 1955, by United Gas Pipe Line Company. In support of this Petition Tyler Gas and City of Tyler state as follows:

1. The names and addresses of all persons upon whom it is requested that copies of any notices, motions, orders or other documents in this proceeding be served are:

J. W. Hickman, President
Tyler Gas Service Company
Southwestern Life Building
Dallas, Texas

Thomas B. Ramey
Citizens National Bank Building
Tyler, Texas

Bryce Rea, Jr.
Munsey Building
1329 E Street, N. W.
Washington 4, D. C.

Counsel For Tyler Gas Service Company and City of Tyler, Texas

Troy Smith
Citizens National Bank Building
Tyler, Texas

City Attorney of Tyler, Texas

2. Tyler Gas Service Company is a public utility enfranchised by the City of Tyler, Texas, to distribute natural gas in the City.

3. The City of Tyler, Texas is a municipal corporation of the State of Texas. It has authority to exercise and in fact exercises authority to enfranchise public utilities to serve the City of Tyler and to regulate the terms, conditions and rates under which public utilities render service in the City.

4. Tyler Gas purchases all of the gas it distributes from the United Gas Pipe Line Company pursuant to a contract first entered into between Tyler Gas and United on November 22, 1940. This contract was amended on May 29, 1946.

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The amended contract reduced the rates paid United by Tyler Gas for gas sold for resale for both domestic and industrial use, and committed United not to increase the rates as reduced for a period of 16 years. The reasons for the rate reduction were that the franchise of Tyler Gas had expired in 1946 and the City was about to refuse to renew it because it had been informed that another distributing company could be organized to purchase and distribute gas at substantially lower rates.

As the District Court for the Eastern District of Texas found in the *Tyler Gas Service Company and City of Tyler* v. *United Gas Pipe Line Company*, E. D. Texas, Civil No. 1662, affirmed 217 F. 2d 73, the principal consideration supporting the amended contract was the granting of a new franchise by the City of Tyler to Tyler Gas for a period coincident with the term of the amended contract, 16 years. This franchise was granted by the City only after United expressly agreed in writing with the City to abide the amended contract for 16 years and further agreed to sell gas to the City on the basis provided in the amended contract in the event the City exercised its reserved right against Tyler Gas to acquire its properties. Memorandum Opinion unreported, reproduced at p. 106 et seq. of Record in No. 15,034 in United States Court of Appeals for the Fifth Circuit, *Tyler Gas Service Company et al.* v. *United Gas Pipe Line Company*, 217 F. 2d 73. The amended contract between United and Tyler Gas was duly filed with the Federal Power Commission and made effective pursuant to Section 4 of the Natural Gas Act.

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5. By the filings which Tyler Gas and Tyler seek by this Petition to have the Commission reject, United proposes, effective November 1, 1955, substantial increases in its rates for sales of gas to Tyler Gas for resale for both

domestic and industrial use. These proposed increases are in violation of the terms of the above described contracts between United and Tyler Gas and the contract between United and the City of Tyler, which contracts are valid and subsisting, and therefore binding until set aside by the Federal Power Commission by a proper order under Section 5 of the Natural Gas Act.

6. The ground upon which rejection of United's filings as to Tyler Gas is sought is that a contract between a natural gas company and a purchaser therefrom duly filed with and accepted by the Federal Power Commission pursuant to Section 4 of the Natural Gas Act is binding on the natural gas company. Therefore the Commission must reject an attempt by a natural gas company to increase rates in violation of its contract by a voluntary, unilateral filing under Section 4 (d) of the Act. The Commission has no right to accept the filing of a new rate schedule in violation of a contract without first determining the reasonableness or unreasonableness of the existing contract rates. The United States Court of Appeals for the Third Circuit specifically so held in *Mobile Gas Service Corporation* v. *Federal Power Commission*, 215 F. 2d 883 (1954).

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The United States Court of Appeals for the District of Columbia Circuit so held in *Sierra Pacific Power Company* v. *Federal Power Commission*, — F. 2d — (1954), construing the parallel provisions of the Federal Power Act. The United States Court of Appeals for the Tenth Circuit applied the same principle in *Colorado Interstate Gas Company* v. *Federal Power Commission*, 142 F. 2d 943 (1944).

The *Mobile* Case is on all fours with the case here. The only distinction in fact between the two is that the contract in the *Mobile* Case governed sales of gas for resale for industrial use, while the contracts between United and

Tyler Gas and between United and City of Tyler govern sales for resale for both industrial and domestic use. This is a distinction without a difference. It is true that increases in rates for gas for domestic use, unlike increases in rates for gas for industrial use, can be suspended by the Commission for five months and thereafter required to be collected under bond subject to refund.

However, the holding of the *Mobile* case, i.e., that a natural gas company may not ignore its contract rates unless the Commission first determines that the contract rates are unreasonable, is applicable whether those rates be domestic rates subject to suspension or industrial rates not subject to suspension. Consideration of the rationale of the holding requires this conclusion. That rationale is that there is a difference in fact ad law between a finding under Section 4 of the Natural Gas Act that a proposed rate is reasonable, a finding that does not imply that the proposed rate is the only reasonable rate, and a finding under Section 5 of the Act that an existing rate is in fact unreasonable.

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This difference, a difference of great practical significance, is the root of the *Mobile* holding. This difference has the same practical significance whether the rate be an industrial rate or a domestic rate. The fact that proposed increases in domestic rates may be suspended for five months and thereafter collected subject to refund pending a determination of reasonable rates under Section 4 of the Act is obviously not in any sense a substitute for the requirement that contract rates may not be set aside unless first found to be unreasonable. In the event of a refund the buyer from a natural gas company receives, not the difference between the suspended rate and his contract rate, but only the difference between the suspended rate and whatever rate less than the suspended rate is found to be

reasonable. Thus he is still deprived of his contract rate without a prior, indeed without any finding, that his contract rate is unreasonable. It is this finding that the *Mobile* Case correctly holds must precede the abrogation of his contract.

WHEREFORE, Petitioners pray that the Federal Power Commission forthwith issue an order rejecting the filing of First Revised Sheet

No. 4 and First Revised Sheet No. 16 of F.P.C. Gas Tariff, First Revised Volume No. 1, of United Gas Pipe Line Company and for such other and further relief as the Commission deems meet in the premises.

/S/ BRYCE REA, JR.
Bryce Rea, Jr.
Munsey Building,
1329 E. Street, N. W.
Washington 4, D. C.
Counsel for
Tyler Gas Service Company
and *City of Tyler, Texas*

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RAMEY, CALHOUN, BRELSFORD & HULL
Citizens National Bank Building
Tyler, Texas

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-9547

In the Matter of:

UNITED GAS PIPE LINE COMPANY, TYLER GAS SERVICE COMPANY, and CITY OF TYLER, TEXAS.

Motion to Dismiss and Answer of United Gas Pipe Line Company to Petition of Tyler Gas Service Company and City of Tyler, Texas

Now comes United Gas Pipe Line Company and files herewith its Motion to Dismiss and Answer to the Petition of Tyler Gas Service Company and the City of Tyler, Texas, for an order rejecting, insofar as they are proposed to be applied to the sales of gas to Tyler Gas, First Revised Sheet No. 4 and First Revised Sheet No. 16 of F. P. C. Gas Tariff, First Revised Volume No. 1, filed September 30, 1955, to be effective November 1, 1955, by United Gas Pipe Line Company, and for grounds of Motion to Dismiss and Answer United Gas Pipe Line Company shows:

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1. The names and addresses of all persons upon whom it is requested that copies of any notices, motions, orders or other documents in this proceeding be served are:

W. W. Brown
United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana

W. O. Crain, General Counsel
United Gas Pipe Line Company
P. O. Box 1407
Shreveport, Louisiana

Thomas Fletcher
11th Floor Esperson Building
Houston 2, Texas.

2. It admits paragraphs 2 and 3 of said Petition.

3. United admits that Tyler Gas purchases gas which it distributes from United, but denies the said purchase is pursuant either to a contract dated November 22, 1940, or an amendment dated May 29, 1946. United shows that by judgment of the United States District Court for the Eastern District of Texas, Tyler Division, in Civil Action No. 1662 on the Docket of that Court styled *Tyler Gas Service Company and the City of Tyler* vs. *United Gas Pipe Line Company* the said Court by judgment long since final adjudged that the contracts referred to had been superseded by

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United's filing of its Conversion Tariff pursuant to the order of this Commision dated July 31, 1952, issued in Docket G-2019, which order in Docket G-2019 is herewith adopted as part hereof, by reference, wherefore since the effective date of the Conversion Tariff gas has been purchased by Tyler Gas Service Company from United pursuant to said Conversion Tariff, and all changes hereafter referred to.

In this connection United shows that in said suit Tyler Gas, with the City of Tyler endeavoring to assist it, alleged that the original contract of November 22, 1940, and the amendment of May 29, 1946, were valid and subsisting contracts in full force and effect and sought a mandatory injunction to compel United to comply with said contracts. To said suit United filed motions to dismiss for want of jurisdiction, motions to dismiss for want of equity, and motions to dismiss for failure to state a claim. Said motions came on for hearing in connection with the application of Tyler Gas and the City of Tyler for a preliminary injunction to prohibit United

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from filing pursuant to Section 4(e) a motion to put into effect increased rates for Tyler Gas at Docket G-2210 before this Commission. From the records of this Commission at Docket G-2210 is adopted as a part hereof the order of suspension dated July 10, 1953, United's motion at the end of the suspension period dated December 24, 1953, and the order putting the suspended rates into effect dated January 25, 1954.

In said cause the contract dated November 22, 1940, known as F.P.C. Rate Schedule No. 42 was offered as Plaintiffs' Exhibit 1 and Defendant's Exhibit 1, which by Article VI had a term to July 25, 1962. As Defendant's Exhibit 7, United offered Order of this Commission dated February 12, 1941, to which order reference is made and adopted as a part of this Motion and Answer, which order in (A) thereof permitted the "Rate Schedules as contained in the agreement of November 22, 1940, * * * to take effect as of November 5, 1940," and by paragraph "(C)" expressly provided that nothing in the order "shall * * * be construed as constituting approval by this Commission of any rate, provision or condition contained in the contract referred to herein; * * *."

Supplement No. 4 to F.P.C. Rate Schedule No. 42, dat-

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ed May 29, 1946, was offered in that cause as Plaintiffs' Exhibit No. 14 and Defendant's Exhibit 3. This amended Article VII of the contract of November 22, 1940, to set up new rate schedules, but did not otherwise change said contract. Supplement No. 5, dated May 21, 1946, relating only to industrial resale rates became Plaintiffs' Exhibit 16 and Defendant's Exhibit 5. Supplements 4 and 5 in the records of this Commission are herewith adopted as

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parts of this Motion and Answer. Tyler Gas and Tyler joined United in offering their Exhibit 19, which was Exhibit "D" to the Motions and Answer of United, which was an order of this Commission dated November 5, 1946, to which order reference is made and said order adopted as a part of this Motion and Answer, which order permitted Supplements 3, 4, and 5 to Rate Schedule F. P. C. No. 42 to take effect. United calls attention of the Commission, as it did the Courts, to Paragraph (A) wherein this Commission permitted only "the Rate Schedules [to be] and the same hereby are accepted for filing and allowed to take effect as of the dates requested"; and to paragraph (C) which, after warning that nothing in the order should be considered a waiver of the requirements of Section 7 of the Act, provided further "Nor shall it be construed as constituting approval by this Commission of

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any service, rate, charge, classification or any rule, regulation, contract or practice affecting such service or rate provided for in the above-designated rate schedules; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; * * *".

As pointed out, United offered in said cause and attached as Exhibit "D" to its said motions and answer there the order of this Commission issued July 31, 1952, in Docket G-2019 permitting the Conversion Tariff as to Tyler Gas to become effective. In connection therewith United also offered in said cause its statement pursuant to Section 154.85 of the Rules and Regulations of this Commission dated May 29, 1952, filed with this Commission, to which statement reference is here made and the same adopted as a part of this Motion and Answer, which statement did not retain any portions of Supplements 4 and 5, Supplement 4

being the so-called amendment of May 29, 1946, which statement was also Defendant's Exhibit 8 in said cause.

Likewise in that cause, Tyler Gas and the City of Tyler, as Exhibit 4, offered a pleading attached as Exhibit

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"A" to the motions and answer of United in said cause, being a protest by Tyler Gas Service Company to the Commission dated July 16, 1952, containing objections and answers to the proposed Conversion Tariff, and praying for a hearing thereon, which protest is adopted from the archives of this Commission as a part of this Motion and Answer. This protest set up similar, if not identical grounds to those contained in the petition of Tyler Gas and the City of Tyler to the said United States District Court for the Eastern District of Texas. Mr. J. W. Hickman, President of Tyler Gas, testified that the protest was prepared by his Dallas attorney and transmitted to the Commission pursuant to his instructions (R. p. 288 in the printed record in Cause No. 15034, United States Court of Appeals for the Fifth Circuit). Mr. Hickman further testified and it was thereupon admitted by counsel for Tyler Gas that no appeal pursuant to Section 19(b) of the Act was taken from the order at G-2919 permitting the Conversion Tariff to be filed (R. p. 305, in Clause No. 15034). Relying on *Sunshine Anthracite Coal Company* v. *Atkins* (1940, 310 U.S. 381) United's position which the Court sustained was that the Conversion Tariff superseded the contract which thus had not been in existence for months.

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Attached hereto as Exhibit "A" is decision of the District Court in said cause holding the conversion tariff superseded the contracts which were no longer in existence as rate schedules before the Commission. See paragraph

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beginning "Tyler Gas did not consent to this change, and protested to the Commission", on p. 6 and the paragraph beginning "The fact that the so-called 'contract rates' agreed upon between the parties here at all times are subject to the approval of * * *" on p. 13 of Exhibit "A". The Fifth Circuit quoted this with approval in Footnote 3, 217 F. 2d at 75-6. The judgment of the District Court dated January 26, 1954 (Exhibit "B" hereto) adopted its opinion as findings and conclusions. The decision of the United States Court of Appeals for the Fifth Circuit, reported at 217 F. 2d 73, was filed on November 24, 1954. Its judgment of affirmance (Exhibit "C" hereto) was dated November 24, 1954. No petition for certiorari was filed to the Supreme Court of the United States. Thus the decisions of the Trial Court and the Court of Appeals in such case are long since final and adjudge that the contracts relied on in paragraph 4 by Tyler and Tyler Gas no longer are operative but stand superseded and replaced.

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In paragraph 4 Tyler and Tyler Gas argue what they conceive to be the effect of said contracts and amendments, as though they were not superseded and replaced by the Conversion Tariff and the statement pursuant to Section 154.85. In the course of this the statement is made that "United expressly agreed in writing with the City to abide the amended contract for sixteen years". In the same suit United, as a part of its motions above referred to and with respect to this claim by the City of Tyler, alleged that the City of Tyler was not a party to the contract with Tyler Gas which contract was wholly and solely subject to regulation by the Commission; that the so-called "agreement" purportedly embodied in the letter was not a part of or attached to as an amendment any portion of said contract; that the same does not constitute a contract;

that there was no consideration moving to United, and that the City of Tyler was wholly without any power at the law to make any contract or such a contract as claimed on the basis of the letter, it not being thereto authorized by its charter. In his opinion, the Trial Court expressed "difficulty spelling out all the elements of a contract between United and City, * * *" (p. 15 of Exhibit "A" hereto) but concluded that the presence of

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the City as a party did not strengthen or aid the position of Tyler Gas, and thus found it unnecessary to determine the question. (p. 15-6 Exhibit "A"). The Fifth Circuit concurred, 217 F. 2d at 75.

4. By paragraphs 5 and 6, which United denies, Tyler Gas and Tyler seek to adopt the position of Mobile Gas Service Corporation and cite the decision of the Third Circuit in that case in 215 F. 2d 883, and that of the District of Columbia Circuit in *Sierra Pacific Power Company* v. *Federal Power Commission,* 223 F. 2d 605. With respect thereto United shows the following:

(1) The *Mobile* case and the *Sierra Pacific* case are now in the Supreme Court of the United States and will be decided there, for which reason United pretermits argument.

(2) Aping Mobile, Tyler and Tyler Gas say that no change of a contract rate can be had pursuant to Section 4, but that the Commission must file a proceeding under Section 5(a) and find the contract and its rates against the public interest before an increase can be had. Tyler Gas and Tyler in the District Court suit above referred to, freely admitted the power of this Commission pursuant to Section 4 to

change contract rates; the Trial Court so found and adjudged (See p. 8 Ex. "A"). Both Tyler and Tyler Gas made numerous admissions of the power of the Commission pursuant to Sections 4(d) and (e) for change of contract rates. Three are selected as typical from the brief filed to the District Judge as follows:

(a) "In a word, the extent of the relief herein sought by the plaintiffs is simply the maintenance of the status quo of the existing rate schedules until such time as the Federal Power Commission shall have rendered an adjudication on the pending application of United for an increase in rates. * * * No question is raised as to the power vested in the Federal Power Commission to regulate the rates charged by United to Tyler Gas, nor do we question here the authority and prerogatives of the Federal Power Commission to modify or amend the rate schedule prescribed in the existing contracts. * * * Furthermore, no attack is here made upon any other action heretofore taken by the Federal Power Commission. Simply stated, plaintiff's position is that inasmuch as the Federal Power Commission has not yet made a decision respecting the justness, reasonableness and lawfulness of the revised schedule of rates, the existing contract rates should be permitted to stand until such time as the Federal Power Commission does reach and announce a decision with reference to same." (p. 6-7)

(b) "Expressly recognizing that the proposed increase in rates 'may be unjust or unreasonable or otherwise unlawful', by its order issued

July 10 the Commission suspended said rates until December 25, 1953, and 'until such further time as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.'

Thereby the Commission exhausted its statutory power to suspend and defer the effectiveness of such rates." (pp. 18-19)

(c) "The filing of new rate schedules with the Federal Power Commission by Defendant without the consent of Tyler Gas on June 24, 1953, did not modify the contract between Tyler Gas and Defendant. To effectuate modification one of two things was necessary, namely, either failure of the Commission to act for a period of thirty days, or an order of the Commission permitting or requiring the proposed rates to become effective. Neither of these things took place. Instead, the Commission, acting under Section 4(e) of the Act upon a finding that the new rates may be unjust and unreasonable, suspended their use for a period of five months, and ordered a hearing to be held respecting their justness, reasonableness and lawfulness. Under Section 4(e) that power having been exercised, the proposed rates can become effective only upon an order of the Commission after the conclusion of the proceedings or upon a motion by Defendant made at the expiration of the suspension period, by which motion the suspension is lifted and the rates become effective even though the proceedings to determine their lawfulness have not been concluded." (pp. 30-1).

(3) Further aping Mobile, Tyler and Tyler Gas claimed that a filing under Section 4(d) was a "unilateral" breach of the contracts. Both courts repudiated this contention, holding United's statutory compliance could not at law be

"unilateral". The District Judge's holding is to be found at p. 11-3 Exhibit "A"; express concurrence of the Fifth Circuit, 217 F. 2d, at page 78.

Mobile's case was argued to the United States Court of Appeals for the Third Circuit on May 19, 1954. When

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Tyler Gas and Tyler filed their brief in the Fifth Circuit in the latter part of August, 1954, both sought to change their position from the admissions above quoted on Section 4 of the Act, and both sought to embrace *Mobile's* position respecting Section 5(a) now sought to be advanced in paragraphs 5 and 6 of the petition here. United noting this change, accepted it, and contested it; the Fifth Circuit did not accept the contentions of Tyler Gas or the City of Tyler based upon Section 5(a) of the Act. (See 217 F. 2d 73).

5. Each and all of the matters advanced in the petition here were pressed upon either the Trial Court or the Court of Appeals for the Fifth Circuit in the litigation filed by Tyler and Tyler Gas, and both Courts repudiated those positions, holding that the claims and contentions of Tyler and Tyler Gas would violate the Act and would be in defiance of Section 4 of the

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Act. Both Courts held that the contracts between Tyler Gas and United now sought to be relied on in paragraph 4 of the petition here, have been replaced and superseded by the Conversion Tariff and had not been in existence for several months. Thus the judgment of the said two courts are res judicata on all of the matters now sought to be advanced by Tyler and Tyler Gas. This petition constitutes an attempt on the part of Tyler and Tyler Gas to relitigate a lost lawsuit. They should not be permitted to obstruct the orderly procedures of this Commission. Their petition is wholly without merit, and should be dismissed.

WHEREFORE, premises considered, United prays that the Commission dismiss and deny the petition of Tyler Gas and the City of Tyler herein, and for such other and further

relief as the Commission deems just, meet and proper in the premises.

THOMAS FLETCHER
11th Floor Esperson Building
Houston 2, Texas
Counsel for United Gas Pipe Line Company.

Of Counsel:

W. O. CRAIN, *General Counsel*

GEORGE D. FISER
P. O. Box 1407
Shreveport, Louisiana

C. HUFFMAN LEWIS
P. O. Box 1707
Shreveport, Louisiana

VERIFICATION

State of Texas }
County of Harris }

BEFORE ME, the undersigned authority, on this day personally appeared Thomas Fletcher, who being by me duly sworn, according to law, states that he is Counsel for United Gas Pipe Line Company and by it authorized to execute the above and foregoing Motion to Dismiss and Answer, and this verification thereto, for and on behalf of and in the name of United Gas Pipe Line Company, that he has read the foregoing petition and is familiar with its contents, and that the facts set forth therein are true to the best of his knowledge, information and belief.

.....

THOMAS FLETCHER

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for Harris County, Texas this the day of October, 1955.

.....

Notary Public in and for Harris County, Texas

My Commission expires June 1, 1957.

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Exhibit "A"

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS, TYLER DIVISION

TYLER GAS SERVICE COMPANY, ET AL., *Plaintiffs*

versus

UNITED GAS PIPE LINE COMPANY, *Defendant*

Civil Action No. 1662

Thomas B. Ramey, of Tyler, Texas; and Bryce Rea, Jr., of Washington, D. C.; for Plaintiff, Tyler Gas Service Co.

Troy Smith of Tyler, Texas; for Plaintiff City of Tyler.

Thomas Fletcher, of Houston, Texas; for Defendant.

December 29, 1953

MEMORANDUM:

The two plaintiffs seek the intervention of the equitable powers of this Court to restrain the defendant from filing a contemplated pleading in a proceeding now pending before the Federal Power Commission. Tyler Gas Service Company (Tyler Gas), a corporation chartered under the laws of this State, is a local natural gas distributing company, selling at retail to the residents of Tyler, Texas. The City of

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Tyler (City) is a municipal corporation likewise chartered under the laws of Texas, with a population of some 40,000 persons. United Gas Pipe Line Company (United) is a Delaware corporation engaged in the transportation and sale of natural gas in interstate commerce for resale. As such, it is a "Natural-Gas Company" within the terms of the Natural Gas Act of 1938 (15 U.S.C.A. 717, et seq.).

Tyler Gas has been purchasing its gas from United since 1940 under the terms of a written contract and several amendments thereto. United has applied to the Federal Power Commission for an increase in rates considerably in excess of those presently in force, and this controversy results from efforts of Tyler Gas and City to restrain the impending efforts of Tyler Gas and City to restrain the impending institution of such proposed rate schedule.

The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 2, 1940, and provided for a price to Tyler Gas of 22½¢ per thousand cubic feet (Mcf); for gas to be resold for domestic use, and for gas for resale by

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Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distrib-

uting company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas for domestic consumption from

22½¢ to 12¢ Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler

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Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

About July 1, 1952, United filed with the Commission a schedule of rates[1] (not those now in issue) which modified slightly the contract rates which theretofore had

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been in effect. By the conversion tariff, United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would con-

[1] Referred to as "conversion rates", as it served to convert United's schedule of rates from contract form to tariff form. Such a change in form was required by rules of the Commission.

stitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with its customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

On June 24, 1953, United filed with the Commission another revision of its schedule of rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

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Upon the filing of the new proposal, by order of July 10, 1953 the Commission set a hearing for July 20, 1953 to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, "In the Matters of United Gas Pipe Line Co.") in order to oppose such proposed increase. The effective date of such proposed rate was suspended, and the use thereof deferred, pending hearing, until December 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4(e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it

would otherwise go into effect. This five month period expires December 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953.

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The initial hearing was held July 20, 1953, as scheduled. Some testimony was taken, and the hearing was then adjourned to be reconvened at a later date. At the present time, it has not been so reconvened. As it appears that United's entire rate structure throughout several states is at issue before the Commission, in all probability the final determination will be long delayed.

Thus plaintiffs say that, come December 25, 1953, United proposes, pursuant to said Section 4(e), to file its motion as contemplated thereby, moving the Commission to permit the proposed schedule to go into effect; that on that date the five-month suspension period permitted the Commission by terms of the statute will have expired; and thereafter it will have no discretion but to permit the increase. While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is argued that this will simply retain the status quo until the Commission has time to act.

Federal jurisdiction exists by reason of diversity of citizenship and amount in controversy, as alleged.

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Having jurisdiction as well of the parties and subject matter, I pass to the main question, whether the plaintiffs

have made a case calling for the exercise of the equitable powers of the Court. The briefs which have been filed by counsel for all parties have been most helpful in the consideration of this question. They fail to disclose any authority directly in point; but from the principles which are clearly established by the authorities, I am convinced that the relief prayed for may not be granted.'

It is abundantly clear the United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. While it is no doubt an oversimplification of the problem, for present purposes it will suffice to say that the business of United is one charged with a public interest; hence, one in its position may not by private contract for future rates collect a rate which is found to be excessive, because such would be unfair to the consumer; neither may it bind itself to rates which are determined to be confiscatory, because to permit such utility to charge and collect rates which are confiscatory of its own property would jeopardize

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its ability properly to serve the public in the future (Union Dry Goods Co. v. Georgia Pub. Serv. Co., 248 U. S. 372, and cases there cited).

Thus the rate-fixing provisions of the United-Tyler Gas contract, as well as many other provisions thereof, are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with the governmental regulation or with public policy, the former must yield (Colo. Interstate Gas Co. v. Fed. Power Comm., 142 Fed. (2d) 943,

aff. 324 U. S. 581, and cases there cited). In such cases, compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise to a cause of action in favor of the other, either for money damages (Miss. Power & Light Co. v. Memphis Natural Gas Co. (162 Fed. (2d) 388) or for specific performance (Mich. Consol. Gas Co. v. Panhandle Pipe Line Co., 173 Fed. (2d) 784).

So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and

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reasonable—and hence lawful—is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates.

While I think it clear that the utility, despite its contract to the contrary, may apply to the appropriate governmental agency for a review of its rate structure, it is equally clear that such utility may not, by purely unilateral action, and without pursuing the statutory method to secure review by the regulatory body, disregard its current contract rates and initiate higher ones (Southern Util. Co. v. City of Palatka, 268 U. S. 232). Plaintiffs contend that the action of United should be so

characterized here, and that it should not, during the long interval while the

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Commission has the matter under consideration, be permitted to collect rates which the Commission has not approved, and which represent only United's own estimate of the rates which it would be just and reasonable for it to collect. The proposed schedule actually is United's "asking price", and in all probability on final determination by the Commission will be whittled down substantially. The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates. United has followed the procedure prescribed by statute to secure this review, and if it files the motion which plaintiffs allege it contemplates, and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (Hope Nat. Gas Co. v. Fed. Power Comm., 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the statute. Section 4 of the Act clearly sets out the circumstances

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under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service shall go into effect." (Emphasis added). It is not for this Court to add another proviso, reading "and where there is no private agreement or contract to the contrary".

Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commis-

sion and not of this Court. The Commission is amply empowered to give adequate relief.

The fact that the so-called "contract rates" agreed upon between the parties here at all times are subject to the approval of, and to modification or change by, the Commission is illustrated by the institution of the new "conversion rates" directed by order of the Commission of July 31, 1953. While the change thus effected was not great dollar-wise, it nevertheless constituted a departure from the figures upon which the parties had agreed. Such new rates became the lawful ones by virtue of the order of the Commission mentioned above, and hence the provisions

of the amended contract which purported to fix the rates for a long period of time in the future, and upon which plaintiffs base their claim for equitable relief, have not been in effect for a matter of several months. During that period when the contract rates were in fact the lawful ones, they became lawful not simply because the parties had agreed thereto. Such rates received their vitality and breath of life from the fact that the Commission permitted such contract to be filed and ordered such rates into effect until further notice. By the order which accomplished this result (plaintiffs' Exh. 19), the Commission was careful to provide that such action should not "be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate".

Adopting the view as outlined above, and by reason of my desire to file this memoranda as soon as possible, I forego the consideration of a number of other questions presented by the pleadings. Among these are certain questions raised by the presence of the City of Tyler. The plaintiffs contend that United

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was a party to a contract not only with Tyler Gas, but that its telegram of February 28, 1946, its letter of April 3, 1946 to the Commission of the City of Tyler, and its conduct throughout the period during which the City was negotiating with Tyler Gas concerning a renewal of its franchise, made out a contract as well between United and the City. While I would have difficulty spelling out all the elements of a contract between United and City, undoubtedly strong elements of estoppel may be invoked by City against United. It is undisputed that City was influenced in granting the renewal franchise to Tyler Gas by the assurances from United that it would sell to Tyler Gas for a long period of time at the 12¢ rate. But I think that the presence of City here as a plaintiff does not strengthen the case against United. If it could not, by virtue of its contract with Tyler Gas, preclude its own application to the Commission for a review of its rate structure, then it could not estop itself by reason of its conduct toward the City from taking the same action.

As I view the case, it is not necessary to

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determine the right of the City to enter into a contract (which United questions). Neither the Federal Power Commission nor many other persons enumerated by United are indispensable parties, whose presence would be required to confer jurisdiction on the Court. Having jurisdiction, I conclude that the plaintiffs do not show grounds for equitable relief, and the action will be dismissed for that reason.

Counsel were notified December 23, 1953 of this ruling. The Clerk will file the foregoing and furnish counsel a copy thereof. This memoranda is adopted as Findings of Fact and Conclusions of Law under Rule 52.

Counsel for defendant will submit order within ten (10) days.

Done at Houston, Texas, this 29th day of December, 1953.

/s/ BEN C. CONNALLY,
Judge.

Filed: Dec. 30, 1953.

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Exhibit "B"

IN THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF TEXAS, TYLER DIVISION

TYLER GAS SERVICE COMPANY, ET AL., *Plaintiffs*

versus

UNITED GAS PIPE LINE COMPANY, *Defendant*.

Civil Action No. 1662

Thomas B. Ramey, of Tyler, Texas; and Bryce Rea, Jr., of Washington, D. C.; for Plaintiff, Tyler Gas Service Co.
Troy Smith, of Tyler, Texas; for Plaintiff City of Tyler.
Thomas Fletcher, of Houston, Texas; for Defendant.

ORDER

Filed Jan. 27, 1954.

For the reasons assigned in the memorandum of the Court filed herein on December 30, 1953, containing the Court's Finding of Fact and Conclusions of Law, to which memorandum, Findings and Conclusions reference is made:

It is Ordered, Adjudged and Decreed:

1.

This Court has jurisdiction of the subject matter of this cause and of the parties hereto.

2.

Neither the Federal Power Commission nor any other of the persons enumerated by the defendant are indispensable parties whose presence is requisite to jurisdiction of this Court.

3.

The application of Plaintiffs for temporary injunction is denied and this cause is herewith in all things dismissed for failure of the Bill of Complaint to state or show grounds for equitable relief.

4.

All costs in this behalf incurred are herewith taxed against Plaintiffs, for which the officers of this Court may have their several executions.

Entered at Houston, Texas, this the 26th day of January, 1954.

/s/ BEN C. CONNALLY,
Judge.

Exhibit "C"

No. 15034

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TYLER GAS SERVICE COMPANY and THE CITY OF TYLER, TEXAS

VS.

UNITED GAS PIPE LINE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the Appellants Tyler Gas Service Company and the City of Tyler, Texas, and the surety on the appeal bond herein, St. Paul-Mercury Indemnity Company, be condemned in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Per
HUTCHESON, *Chief Judge*

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-9547

In the Matter of

UNITED GAS PIPE LINE COMPANY

Motion to Make Effective Suspended Tariff Sheets

Now comes United Gas Pipe Line Company (hereinafter called "United"), in the above entitled and numbered cause, and respectfully shows.

1.

Reference is made to the Order of the Federal Power Commission issued in the above numbered proceeding on October 26, 1955, wherein United's First Revised Sheet Nos. 1, 4, 6, 8, 10, 12, 14, 21, 22, 23, 25, 26, 27, 28, 30, 32, 99, 100, 101, 102, 103, 104, and revised Title Sheet to its FPC Gas Tariff, First Revised Volume No. 1, and proposed First Revised Sheet Nos. 54 and 57 to its FPC Gas Tariff, Original Volume No. 1, were suspended until April 1, 1956. By Order issued January 6, 1956, revised Title Sheet and

First Revised Sheet No. 99 to its FPC Gas Tariff, First revised Volume No. 1, and First Revised Sheets Nos. 54 and 57 to its FPC Gas Tariff, Original Volume No. 1, were allowed to become effective

as of November 8, 1955. The above entitled and numbered proceeding has not been concluded and no order has been issued up to the present time respecting the remaining Sheets.

WHEREFORE, United moves that said rates and charges provided for in said described Sheets, other than those heretofore allowed to become effective, shall go into effect on April 1, 1956, as above stated.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY

Original signed

By A. D. GREENE
Executive Vice President

Counsel for
United Gas Pipe Line Company:

Wilbert O. Crain
Geo. D. Fiser
1525 Fairfield Avenue
Shreveport, Louisiana

Thomas Fletcher
11th Floor Esperson Building
Houston, Texas

C. Huffman Lewis
Vernon W. Woods
P. O. Box 1707
Shreveport, Louisiana

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STATE OF LOUISIANA
PARISH OF CADDO

Personally came and appeared before me, the undersigned duly qualified and acting Notary Public, A. D. GREENE, who being by me, Notary, first duly sworn, deposes and says:

That he is Executive Vice President of United Gas Pipe Line Company, duly authorized to act herein; that he has read the above and foregoing Motion and that the facts and allegations therein set forth are true and correct to the best of his knowledge and belief.

Original signed

A. D. GREENE

SWORN TO AND SUBSCRIBED before me on this 14th day of March, 1956.

RAI S. MELTON
Notary Public in and for
Caddo Parish, Louisiana

(Notarial Seal)

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion to Make Effective Suspended Tariff Sheets on the following named persons and organizations by

mailing a copy, postage prepaid and properly addressed, to said persons and organizations:

Sam M. Johnston, Attorney
Mobile Gas Service Corporation
P. O. Box 550
804 First National Bank Annex
Mobile 4, Alabama

H. D. McHenry
William S. Tarver
Southern Natural Gas Company
P. O. Box 2563
Birmingham, Alabama

Mr. Edward S. Kirby, Assistant General Solicitor
Public Service Electric and Gas Company
80 Park Place
Newark 1, New Jersey

Alabama Public Service Commission
Montgomery, Alabama

Reuben Goldberg, Esq., Counsel for
City of Memphis, Tennessee
Memphis Light, Gas & Water Division,
City of Memphis, Tennessee

Mississippi Valley Gas Company
439 Wyatt Building
777-14th Street, N. W.
Washington 5, D. C.

Keith M. Pyburn
Texas Eastern Transmission Corporation
425 13th Street, N. W.
Washington 4, D. C.

Public Service Commission of the State of New York
Albany, New York

Harold Seligman
Acting General Counsel
Tennessee Public Service Commission
Cordell Hull Building
Nashville, Tennessee

Georgia Public Service Commission
5th Floor, Atlanta National Building
50 Whitehall Street
Atlanta, Georgia

Vincent P. McDevitt, Esq.
Philadelphia Electric Company
1000 Chestnut Street
Philadelphia 5, Pennsylvania

Donald I. Moritz, Esq.
Equitable Gas Company
420 Boulevard of the Allies
Pittsburgh 19, Pennsylvania

Christopher T. Boland, Esq.
Texas Gas Transmission Corporation
821 Fifteenth Street, N. W.
Washington 5, D. C.

A. W. Manley
Mississippi River Fuel Corporation
407 North Eighth Street
St. Louis 1, Missouri

C. W. Sullivan, City Attorney
City of Hattiesburg, Mississippi

John C. Satterfield, Counsel
City of Jackson, Mississippi
Plaza Building
P. O. Box 1172
Jackson, Mississippi

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J. David Mann, Jr.
The United Gas Improvement Company
1230 Pennsylvania Building
Washington 4, D. C.

Green, Green & Cheney
Willmut Gas & Oil Company
Box 1666
Jackson, Mississippi

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Bryce Rea, Jr., Esq., Counsel for
City of Tyler, Texas
Tyler Gas Service Company
Willmut Gas & Oil Company
Munsey Building
1329 E Street, N. W.
Washington 4, D. C.

George N. Reed
Consolidated Natural Gas System
744 Pennsylvania Building
Washington 4, D. C.

Ray O. Martin, Esq.
The East Ohio Gas Company
1405 East Sixth Street
Cleveland 1, Ohio

Arthur H. Forbes, Vice President
New York State Natural Gas Corporation
2 Gateway Center
Pittsburgh, Pennsylvania

James B. Sayers, Esq.
The Peoples Natural Gas Company
2 Gateway Center
Pittsburgh, Pennsylvania

G. C. Williams, Esq.
Room 3000
30 Rockefeller Plaza
New York 20, N. Y.

Charles S. Maddock, General Counsel
Hercules Powder Company
Wilmington, Delaware

Harry S. Littman, Counsel for
Alabama Gas Corporation
317 Wyatt Building
Washington, D. C.

Foley, Chappell, Kelly & Champion, Counsel for
Gas Light Company of Columbus
P. O. Box 196
Columbus, Georgia

F. C. Hillyer, Attorney for
South Atlantic Gas Company
227 West Forsyth Street
Jacksonville 2, Florida

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J. M. Costello, Vice President
South Carolina Natural Gas Company
P. O. Box 390
Columbia, South Carolina

Atlanta Gas Light Company
243 Peachtree Street, N. E.
Atlanta 2, Georgia

L. G. Hills, President
L. G. Hills & Associates Incorporated
13 Courtland Drive
Montgomery, Alabama

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Mr. Louis Kaplan
Staff Counsel
Federal Power Commission
General Accounting Office Building
441 G Street, N. W.
Washington, D. C.

Dated at Shreveport, Louisiana, on this 20th day of March, 1956.

Original signed:

GEO. D. FISER
Counsel

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-2210

IN THE MATTER OF

UNITED GAS PIPE LINE COMPANY

Motion of Tyler Gas Service Company for Order Directing Refund

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Comes now Tyler Gas Service Company and, pursuant to Sections 4(e) and 16 of the Natural Gas Act, moves the Commission to issue an order directing United Gas Pipe Line Company to refund, with interest at 6 percent per annum, the amounts of money United has collected for

gas delivered to Tyler Gas for re-sale for other than industrial use only as a result of United's increases in rates in Docket No. G-2210.

In support of this Motion Tyler Gas states as follows:

Communications respecting this Motion are to be addressed to:

J. W. Hickman
Southwestern Life Building
Dallas, Texas
President, Tyler Gas Service Company

Thomas B. Ramey, Esq.
Citizens National Bank Building
Tyler, Texas
Counsel For Tyler Gas Service Company

Bryce Rea, Jr., Esq.
Munsey Building
Washington 4, D. C.
Counsel For Tyler Gas Service Company

The History of the Purchases of Gas From United By Tyler Gas

The history of the circumstances under which Tyler Gas has purchased and now purchases gas from United are well summed up in the Memorandum Opinion and Findings of Fact and Conclusions of Law rendered on December 29, 1953, by the United States District Court for the Eastern District of Texas in *Tyler Gas Service Company and City of Tyler* v. *United Gas Pipe Line Company*, Civil No. 1662. They are printed in the Record in ibid, No. 15,034 in the United States Court of Appeals for the Fifth Circuit, at pp. 107, 108, 109.

"The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½c per thousand cubic feet (Mcf), for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission

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was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½c to 12c Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12c from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2c for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was

on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures."

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Attached hereto and made a part hereof as an Appendix are the texts of documents introduced in evidence in the case in the District Court and relied upon by the Court in making the quoted findings.

The Course of the Proceedings in Docket No. G-2210

On June 24, 1953, in Docket No. G-2210, United filed under Section 4(d) of the Natural Gas Act proposed increases in both its domestic and industrial rates to Tyler Gas. Tyler Gas and the City of Tyler intervened in Docket No. G-2210. Tyler Gas in its Petition for and City of Tyler in its Notice of Intervention challenged the legality of United's proposed rate increases on the ground that they were in violation of the obligations of United under contracts among it, Tyler Gas and the City of Tyler, Texas.

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The proposed increases in industrial rates were made effective July 25, 1953. The proposed increases in domestic rates were suspended by the Commission pursuant to Section 4(e) of the Natural Gas Act for the maximum statutory period of five months. They became effective December 25, 1953, under an order lifting suspension issued January 25, 1954. That order provided in part as follows:

"(A) United shall refund to those entitled thereto any portion of the increased rates and charges made effective as of December 25, 1953, at Docket No. G-2210 . . . found by the Commission in these proceedings not justified, with interest at the rate of 6% per annum from the date of payment to United until refunded; shall bear all costs of any such refunding; shall keep accurate accounts in detail of all amounts received by reason of such increased rates and charges for each billing period, specifying by whom and in whose behalf such amounts were

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paid, and reporting in writing and under oath to the Commission monthly for each billing period the names of the purchasers, the maximum demands, the billing demands and volumes of natural gas sales to each of such purchasers and the revenues resulting therefrom, as computed under the rates in effect prior to December 25, 1953, at Docket G-2210, . . . and under the rates allowed by this order to become effective together with the differences in the revenues so computed;"

Thereafter conferences among United, the Commission's Staff and various intervenors were held. These resulted in a partial settlement of the issues in Docket No. G-2210, which settlement was approved by the Commission in Opinion and Order No. 277, issued November 2, 1954. Throughout the settlement conferences Tyler Gas and City of Tyler stood on their challenge to the legality as to Tyler Gas of

United's filing in Docket No. G-2210. They therefore accepted the settlement only conditionally, subject to the determination of the legality of any increase in rates to Tyler Gas. Transcript of Record in Docket No. G-2210, August 17, 1954, pp. 3066, 67, 68.

The Commission took cognizance of the position of Tyler Gas and Tyler in its Opinion and Order No. 277. At pages 20 and 21 thereof (Mimeo.) it said:

"These intervenors at Docket G-2210 have stated that they do not object to the establishment of the rates proposed for sales by United in its Central Rate Zone except to the extent that their establishment is founded on the conclusion that such rates are lawful or just and reasonable for sales by United to Tyler. Such intervenors, proceeding on the theory that the rates provided in the existing contracts between United and Tyler Gas are binding upon United until set aside as

unjust and unreasonable in a proceeding under Section 5 of the Act, instituted a suit in the District Court of the United States for the Eastern District of Texas, Tyler Division, in Civil Action No. 1662, styled *Tyler Gas Service Company et al.* v. *United Gas Pipe Line Company*, to enjoin United from Moving to put into effect rates filed at Docket No. G-2210 applicable to Tyler Gas. Upon dismissal of such action by the District Court, Tyler Gas and City of Tyler noted an appeal to the United States Court of Appeals for the Fifth Circuit. That appeal is now pending. . . .

"[I]n view of the appeal noted by Tyler Gas and Tyler in the United States Court of Appeals for the Fifth Circuit and the allegations in their petitions to intervene, we shall provide that the proceedings at Docket No. G-2210 also remain open for the determination of the issues raised in said petitions to intervene by Tyler Gas and Tyler. Accordingly, the suspension of the rates and charges of United to Tyler Gas shall continue subject to the undertaking and

refund, but we shall stay our orders at Docket No. G-2210 to the extent that Tyler Gas is required to pay more than the proposed settlement rates applicable to it."

It then provided in Paragraphs (C) and (O) of its Order that:

"(C) The provisions of the orders of the Commission issued at . . . Docket No. G-2210 on July 10, 1953, and January 25, 1954, relating to Rate Schedules DG-C and G-C in so far as they are applicable to sales of natural gas to Tyler Gas shall continue in full force and effect until further orders of the Commission, *Provided, however*, That the effect of the order issued on January 25, 1954, at Docket No. G-2210 be and it is hereby stayed to the extent that it requires Tyler Gas to pay more than 17¢ per Mcf for gas purchased under the first block of Rate Schedule DG-C and more than 12.5¢ per Mcf under the second block thereof, and more than 16¢ per Mcf for all gas purchased under Rate Schedule G-C, all as provided in the settlement, pending determination of the issues raised by Tyler Gas and Tyler in their petitions to intervene; and *Provided further*, That Tyler Gas shall not be required to pay United more than 12.5¢ per Mcf for all gas purchased under Rate Schedule IND-C."

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"(O) ". . . the proceedings in Docket G-2210 shall remain open for the purpose . . . (b) in view of the pending appeal of Tyler Gas and Tyler in the United States Court of Appeals for the Fifth Circuit, referred to previously, and their petitions to intervene in the proceedings in Docket No. G-2210, determining the matters involved and issues presented by the petitions to intervene of Tyler Gas and Tyler."

There have been no further proceedings in Docket No. G-2210 respecting the foregoing matters.

Occurrences Since the Issuance of Opinion 277
Docket No. G-2210

On February 27, 1956, the Supreme Court rendered its opinion in *Federal Power Commission* v. *Mobile Gas Service Corporation*, and *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332. The Court held, *inter alia* that "the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally," and that an increased rate schedule filed in violation of a contract is "a nullity insofar as it purport[s] to change the rate set by [the] contract . . . and that the contract rate remains the only lawful rate."

After the Supreme Court's opinion was rendered, counsel for Tyler Gas on March 26, 1956, wrote a letter to the Secretary of the Commission in which he stated in part:

> "In view of the Supreme Court's holding in the Mobile case that a filing under Section 4 of the Natural Gas Act in violation of a contract is void, it is clear that United's filings in Docket G-2019, Docket G-2210 and Docket G-9547 are void insofar as they purport to apply to sales by United to Tyler Gas.
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> It follows that the only legal rates for sales by United to Tyler Gas are the rates that were in effect on August 2, 1952, the day before any of the changes in rates proposed in Docket G-2019 became effective. For that reason Tyler Gas is demanding of United refund with interest at 6% of all amounts paid by Tyler Gas to United in excess of the amounts due under the legal rates and is notifying United that it will henceforth pay no more than the legal rates."

On March 30, 1956, Tyler Gas wrote United tendering payment for gas received in February, 1956 on the basis of its contract with United described above and demanding refund, with interest at 6% per annum, of all amounts paid

in excess of the amounts due under the contract. On April 13, 1956 United returned the check of Tyler Gas in payment for gas received in February, 1956, with a request for immediate payment on the basis of the increased rates effected in Dockets Nos. G-2019, G-2210 and G-9547.

On April 30, 1956 Tyler Gas wrote United tendering payment for gas received in both February and March, 1956 on the basis of its contract with United described above, and again demanded refund, with interest at 6% per annum, of all amounts paid in excess of the amounts due under the contract. On May 4, 1956 United returned the checks of Tyler Gas for gas received in February and March, 1956 and demanded payment forthwith on the basis of the increased rates effected in Dockets Nos. G-2019, G-2210 and G-9547.

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The Applicability of the *Mobile* Case to United's Filings in Dockets Nos. G-2019, G-2210 and G-9547

From the foregoing facts, which are not disputable, it is clear that United's increased rate filings in Docket No. G-2019, Docket No. G-2210 and Docket No. G-9547 were unilaterally made in violation of its existing contract with Tyler Gas. It is clear that Tyler Gas did not consent to or acquiesce in those filings. Indeed it actively and vigorously challenged the legality of the filings in G-2210 and G-9547 at every opportunity throughout those proceedings.

The filing of the conversion tariff in Docket No. G-2019 is on a somewhat different footing. It was made in compliance with Rule 154.82 of the Federal Power Commission, requiring that rates provided in contracts be restated in dollars and cents per unit. Rule 154.83 required the restatement by a date certain. United thus did not file its conversion tariff voluntarily. Indeed, in *United Gas Pipe Line Co.* v. *F. P. C.*, 181 F. 2d 796, it sought to challenge

the Commission's right to compel the filing in the United States Court of Appeals for the District of Columbia Circuit. The Court did not pass on the merits but dismissed the petition for review on the ground that Rule 154.82 was issued in the exercise of the Commission's rule making and not its judicial or quasi-judicial authority, and was therefore judicially reviewable only in the District Court by way of a suit for injunction or defense of an action to enforce compliance with it.

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Assuming *arguendo* that the rule of the *Mobile* Case is not applicable to the filing in G-2019, the right of Tyler Gas to a refund of all of the increased rates effected in Dockets Nos. G-2210 and G-9547 is not thereby altered. The contract between Tyler Gas and United was not thereby superseded any more than was the contract between Mobile and United. Both contracts were modified in the same way and at the same time by the filing of the conversion tariff. In *Mobile Gas Service Corporation* v. *Federal Power Commission*, 215 F. 2d 883 (1954), affd., 350 U. S. 332, the United States Court of Appeals for the Third Circuit had no difficulty in holding that such modification did not destroy the contract, but left it in effect as modified. This holding is not only sound as a matter of general contract law, but in accord with the Commission's Rules.

Rule 154.85 of the Commission specifically provides that existing contracts remain in effect except to the extent that they are modified by conversion filings under Rule 154.82. Since the contract between Tyler Gas and United precludes an increase in rate during the term of the contract, it necessarily precludes the filing of an increase under Section 4 of the Natural Gas Act. This result is clearly contemplated by Rule 154.38(d)(3), which provides that a natural gas company *may* include in its contract the reservation of a right to propose to the Commission changes in the effec-

tive rates, provided that the reservation effectuates changes only in the manner provided in Section 4 of the Natural Gas Act. United not only failed to reserve a right to propose rate changes, but specifically agreed to abide the contract rates for

16 years. Letter of R. W. Fair and telegram of R. H. Hargrove, then Vice President and General Manager of United reproduced in Appendix hereto. It is therefore bound to the contract rates absent a finding and order by the Federal Power Commission under Section 5 of the Act.

The fact that, while the conversion tariff was under consideration by the Commission, Tyler Gas wrote a letter to the Commission protesting the slight increase in the contract rate for industrial sales effected by the tariff did not join any issue respecting the legality of the filing of the tariff. The letter of Tyler Gas did not initiate, or make it a party to, any proceeding before the Commission. The letter was not a formal complaint. Rule 1.6(b) of the Rules of Practice and Procedure. Only formal complaints "will initiate formal proceedings or make complainant a party to proceedings already initiated." Rule 1.6(a)(2). The letter thus did not make Tyler Gas a party to any proceeding or raise any issue for decision by the Commission. It simply reaffirmed the position of Tyler Gas that it would not voluntarily consent to any modification of, much less the abrogation of its contract with United. Moreover, the Commission neither passed on the merits of any claim in connection with United's conversion rates, nor approved the rates. It simply issued an order accepting the rates for filing and permitting them to take effect. That order expressly recited that its issuance was not approval of any "service, rate, charge, classification, or any rule, regulation, contract, or practice . . . nor . . . recognition of any claimed contractual right or obligation."

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Furthermore, the letter of Tyler Gas protesting the conversion tariff did not and could not raise the issue of the right of United unilaterally to violate its contracts by a voluntary filing under Section 4 of the Natural Gas Act. As has been seen, United's conversion tariff was filed involuntarily in compliance with Rule 154.82. Thus the only issues Tyler Gas could raise in connection with the filing of the conversion tariff were the authority for and the appropriateness of the rule of the Federal Power Commission requiring the modification of the contract between Tyler Gas and United. The issue joined by Tyler Gas and City of Tyler in G-2210 and G-9547 and determined in the *Mobile* Case is not the propriety or appropriateness of any action of the Federal Power Commission finding contracts unjust, unreasonable or otherwise improper and requiring them to be modified. On the contrary, the issue is whether such action is a pre-requisite to their modification.

It follows that the rule of the *Mobile* Case, supra, is applicable here. Under that rule United's increased rates are a nullity insofar as they purport to change the rates established in the contract between Tyler Gas and United, all amounts paid by Tyler Gas in excess of the contract rates were unlawfully collected, and United is obligated to make restitution of the excess payments. Having refused to do so, it can be compelled to do so by appropriate administrative and judicial processes. Tyler Gas therefore files this Motion.

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The Nature and Effect of the Proceedings in *Tyler Gas and City of Tyler* v. *United Gas Pipe Line Company* in the Fifth Circuit

It is true that Tyler Gas, along with the City of Tyler, previously sought judicial relief. They brought suit in

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the United States District Court for the Eastern District of Texas, Civil No. 1662, to enjoin United from making effective the rates suspended by the Commission's order in Docket No. G-2210, and for a declaration that the contracts between Tyler Gas and United and between City of Tyler and United were valid, subsisting and enforceable, that the suit was dismissed, and that the dismissal was affirmed by the United States Court of Appeals for the Fifth Circuit, 217 F. 2d 73. But this in no way forecloses Tyler Gas from relief under the rule of the *Mobile* Case, supra.

Neither the District Court nor the Court of Appeals purported to adjudicate the merits of the Complaint of Tyler Gas and City of Tyler. Neither Court held that Tyler Gas and Tyler were not entitled to relief. Neither Court held that the contracts between Tyler Gas and United and between City of Tyler and United could be or were abrogated by a filing under Section 4 of the Natural Gas Act.

The order of the District Court that was affirmed dismissed the Complaint on the ground that the doctrine of primary administrative jurisdiction precluded resort to the Courts except by way of review of administrative action. Both the District Court and the Court of Appeals were of the view that the Commission "is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought" from the Commission. 217 F. 2d 73, 74.

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In other words, both Courts held only that Petitioners had failed to exhaust their administrative remedies. Had the Court of Appeals held that contract rates could be abrogated by a filing under Section 4 of the Act, it would of course have recognized that the *Mobile* Case is to the contrary. In fact the Court of Appeals discussed the *Mobile*

Case in its opinion, accurately stated its holding and then concluded that "the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this Court.'"

That this is the correct reading of the opinions of the District Court and the Court of Appeals is confirmed by the statement of the Supreme Court in the *Mobile* Case, supra that: "The Court of Appeals for the Fifth Circuit, *although distinguishing its decision* [from the *Mobile* Case] *on a procedural ground,* has indicated a contrary conclusion." (Emphasis supplied.)

In these circumstances the issues raised by Petitioners are not *res judicata.* It is axiomatic that the dismissal of a suit on the ground that the court lacks authority to grant the relief the plaintiff seeks is not an adjudication that the plaintiff is not entitled to relief in an appropriate proceeding in an appropriate forum.

By this Motion Tyler Gas seeks the refund of only that portion of its excess payments to United which the Commission has unquestioned authority to order pursuant to the express language of Section 4(e) of the Natural Gas Act and its Orders in Docket No. G-2210. Order of January 25, 1954; Opinion and Order No. 277, November 2, 1954.

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By so limiting its request here Tyler Gas does not waive its right to seek refund of the remainder of the excess payments made to United by appropriate proceedings in this Commission or elsewhere. On the contrary, it expressly reserves that right. It limits its request here only because the posture of Docket No. G-2210, in the light of the Commission's Orders therein, and the Rules of Practice and

Procedure of the Commission make a request for further relief by way of this Motion inappropriate.

WHEREFORE, Tyler Gas Service Company prays the Commission to issue an order directing United Gas Pipe Line Company to refund to Tyler Gas Service Company all of the increased rates and charges made effective as of December 25, 1953 in Docket No. G-2210 not heretofore refunded pursuant to Paragraph (D) of the ordering portion of Opinion and Order No. 277, issued November 2, 1954, with interest at the rate of 6% per annum from the date of payment until refunded, and further directing United to bear all costs incident to the making of said refund.

Respectfully submitted,

/S/ BRYCE REA, JR.
Bryce Rea, Jr.
919 Munsey Building
Washington 4, D. C.

/S/ THOMAS B. RAMEY
Thomas B. Ramey
Citizens National Bank Building
Tyler, Texas

Of Counsel:

WATKINS & REA
919 Munsey Building
Washington 4, D. C.

RAMEY, CALHOUN, BRELSFORD & HULL,
Citizens National Bank Building
Tyler, Texas

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APPENDIX

R. W. Fair Interests
Oil Producer—Royalties

Peach and Pecan Grower
Citizens National Bank Building
Box 689—Phone 3321
Tyler, Texas
-Division-

February 28, 1946

Mr. M. W. Ransom, Manager
Union Production Company
Tyler, Texas

Dear Sir:

This is in line with our conversation in regard to the City of Tyler granting a franchise to the Tyler Gas Service Company.

I have talked to several of my associates who have been working toward a better gas rate for Tyler, and we all agree to discontinue our efforts in behalf of a new gas company and to withdraw the application for a franchise from the City of Tyler, subject to the following agreement and understanding on the part of the United Gas Pipe Line Company and the Tyler Gas Service Company:

1. The United Gas Pipe Line Company will establish a 12c gas rate for domestic and commercial gas delivered to the Tyler Gas Service Company at the City gate, same being 2c less than the 14c rate which has previously been offered;

2. The Tyler Gas Service Company will agree to give the domestic and commercial consumer of gas all of the benefit of such 2c reduction in rates and to reduce the schedule of domestic and commercial rates heretofore submitted to the City Commission to such extent;

3. In the event the City of Tyler should exercise the privilege contained in the franchise of the Tyler Gas Service Company to acquire the property of said company of the United Gas Pipe Line Company will agree to afford the City of Tyler, or its assigns, the privilege of purchasing gas from it at the above 12c gas rate for domestic and commercial consumption and for industrial

rates upon the basis of the proportionate part accruing to the United Gas Pipe Line Company of the proceeds of the rates charged for industrial deliveries, as provided in the last schedule of rates submitted by the Tyler Gas Service Company to the City Commission. Said proportion of such industrial rates to which the United Gas Pipe Line Company is entitled under its said agreement with Tyler Gas Service Company is eighty (80%) per cent of the proceeds of such industrial gas sold, provided that said United Gas Pipe Line Company shall not receive less than 7.2c for industrial gas deliveries;

4. The United Gas Pipe Line Company and the Tyler Gas Service Company will agree to make the rates above provided effective immediately after the franchise applied for by the Tyler Gas Service Company is granted, and to keep same in effect as maximum rates for a period of sixteen (16) years thereafter, or during the life of such franchise, subject only to increases therein occasioned by increases in existing gross production taxes, severance taxes,

pipe line taxes, and other taxes except ad valorem taxes and income taxes

Yours truly,

R. W. FAIR,
(R. W. Fair).

Confirmation By Mail

Western Union

Shreveport La Feb 28 1946

Tom Ramey
Attorney for Tyler Gas Service Company
Citizens National Bank Bldg
Tyler, Texas

I am familiar with conditions of letter from R W Fair to M W Ransom dated February twenty eighth and on behalf of this company hereby agree to comply with the conditions set forth in said letter insofar as they relate to this company

R H HARGROVE
Vice President and General Manager
United Gas Pipe Line Company

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An Excerpt from Minutes of Regular Meeting of the City Commission, City of Tyler, Texas, April 5, 1946.

A regular meeting of the City Commission of the City of Tyler, Texas, was held in the Commission Chamber in the City Hall, at 2 P.M., April 5, 1946, with the following being present:

Commissioners: S. G. Fry, Chairman, W. M. Shieldes, Cecil McCullars, D. K. Caldwell, Bryan W. Payne.

Acting City Manager: J. P. Ferrill.
City Attorney: Troy Smith.
City Clerk: G. V. McNallie.

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The City Attorney read a proposal of the United Gas Pipe Line Company in connection with the gate rate for gas serving Tyler, as follows:

United Gas Pipe Line Company
Shreveport 92, Louisiana

April 3, 1946

The Commission of the City of Tyler
Tyler, Texas

Gentlemen:

In accordance with our previous commitment, as contained in telegram to Mr. Ramey, attorney for Tyler Gas Service Company, dated February 28, 1946, we beg to advise as follows:

That when the new franchise now proposed by the Tyler Gas Service Company becomes effective, the United Gas Pipe Line Company agrees to sell gas to the Tyler Gas Service Company, delivered at the City gate, for domestic and commercial consumption, at the rate of 12c per thousand cubic feet; and it also agrees to the schedule of rates proposed by the Tyler Gas Service Company for industrial gas, in which this company participates on a percentage basis according to its contract with Tyler Gas Service Company, as amended, provided that United Gas Pipe Line Company shall not receive less than 7.2c for any industrial gas deliveries. In the event the City of Tyler should exercise the privilege contained in said franchise to acquire the property of the Tyler Gas Service Company, the United Gas Pipe Line Company agrees to afford the City of Tyler, or its assigns, the privilege of purchasing gas from it at the aforesaid rates. The United Gas Pipe Line Company further agrees that such rates shall be the maximum rates which it shall charge for such gas for a period of sixteen years, subject to such

increases therein as may be occasioned by increases in existing gross production taxes, severance taxes, pipe line taxes, and other taxes except ad valorem and income taxes.

Yours very truly,

UNITED GAS PIPE LINE COMPANY

By (Signed) R. H. HARGROVE,
Vice-President

The City Attorney read resolution as follows:

Resolution

Be It Resolved by the City Commission of the City of Tyler, Texas:

That the proposal of the United Gas Pipe Line Company to the City Commission of the City of Tyler, outlined in the Letter of April 3, 1946, be and the same is accepted as a contract between the City of Tyler and the United Gas Pipe Line Company, with the understanding that said proposal as submitted will be in full force and effect as a contract in the event the new franchise to the Tyler Gas Service Company is finally passed and approved by the voters of the City of Tyler, at an election to be held in accordance with the order of the City Commission ordering an election which is a part of the franchise contract passed by the City Commission of the City of Tyler. The letter is ordered recorded in the Minutes of the City Commission.

Passed And Approved this the 5th day of April, A.D. 1946.

(Signed) S. G. FRY,
Chairman, City Commission,
City of Tyler, Texas.

Attest:

(Signed) G. V. MCNALLIE,
City Clerk.

The chairman called for the recommendations of the City Manager, which were presented in writing and read as follows:

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April 5, 1946

Honorable City Commission
City of Tyler, Texas

Gentlemen:

I hereby recommend that the resolution accepting proposal of the United Gas Pipe Line Company be passed as read.

Respectfully,

(Signed) J. P. Ferrill,
Acting City Manager.

Commissioner Caldwell moved that the resolution be passed as read. Motion seconded by Commissioner Payne and carried.

Mr. Jack Williams was present, and presented a new proposal for gas franchise for Tyler.

The City Clerk presented ordinance as follows:

An Ordinance granting the Tyler Gas Service Company, a Texas Corporation, it's successors and assigns, a franchise authorizing it to use the streets, alleys and other public places in the City of Tyler, Texas, in the purchase, sale supply and distribution to the City and the inhabitants thereof natural gas for the purpose of supplying light, heat and power, and providing for a referendum of said matter to a vote of the qualified voters in said City and calling an election to be held for the purpose of submitting such question to the qualified voters in the City of Tyler, Texas. (Ord. Book 7, Page 396.)

The Chairman called for the recommendations of the City Manager, which were presented in writing and read as follows:

April 5, 1946

Honorable City Commission
City of Tyler, Texas

Gentlemen:

I hereby recommend that the ordinance granting a franchise to the Tyler Gas Service Company, and calling an election to be

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held on this matter, pass third and final reading.

Respectfully,

(Signed) J. P. FERRILL,
Acting City Manager.

Commissioner Shieldes moved that the ordinance be placed on third and final reading. Motion seconded by Commissioner Payne and carried.

Commissioner Shieldes moved that the ordinance pass third and final reading and be finally adopted. Motion seconded by Commissioner Payne and carried.

Commissioner Payne moved that the franchise election be held on Tuesday, May 14, 1946. Motion seconded by Commissioner Shieldes and carried.

(S.) S. G. FRY,
(S. G. Fry),
Chairman, City Commission,
City of Tyler, Texas.

(S.) W. M. SHIELDS,
(W. M. Shields),
Vice-Chairman,
City Commission,
City of Tyler, Texas.

Attest:

(S.) G. V. MCNALLIE,
City Clerk.

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I, G. V. McNallie, City Clerk of the City of Tyler, Texas, certify that the above and foregoing is a true and correct excerpt from the City Commission Minutes dated April 5, 1946, which is recorded in the City Commission Minute Book No. 13, Pages 363 and 364.

Done this the 7th day of December, 1953.

G. V. McNallie,
City Clerk

(Seal)

• • • • • • • • • • •

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-1142

Docket No. G-2210

In the Matter of

United Gas Pipe Line Company

Answer of United Gas Pipe Line Company to "Motion of Tyler Gas Service Company for Order Directing Refund"

Now comes United Gas Pipe Line Company (United) and files herewith its answer to the motion of Tyler Gas Service Company (Tyler Gas) filed at Docket G-2210 on May 15, 1956 and for answer says:

I.

Origin of Present Motion

Heretofore the Federal Power Commission (Commission) issued its Opinion and Order No. 277 on November 2, 1954 in which it set and prescribed rates applicable to Tyler Gas for natural gas delivered to it. Such opinion approved a settlement of the matters involved in consolidated dockets

which included Docket G-1142, a Section 5 (a) proceeding, and Docket G-2210, a notice of change for increased rates (applicable to Tyler Gas) filed by United, and ordered both dockets kept open as to Tyler Gas pending the decision and determination of an appeal by Tyler Gas from an adverse judgment by the United States District Court for the Eastern District of Texas in a case styled *Tyler Gas Service Company, et al.* vs. *United Gas Pipe Line Company* then pending in the United States Court of Appeals for the Fifth Circuit as No. 15034 on the docket in that Court. Such rates, in United's FPC Tariff filed

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pursuant to said Order and Opinion 277, remained the filed and legal rates until superseded by the noticed Change of Rates at Docket G-9547 as of April 1, 1956 upon motion filed by United at the expiration of suspension in said docket pursuant to Section 4 (e) of the Natural Gas Act (Act).

On March 26, 1956, Counsel for Tyler Gas wrote a letter to Mr. Leon M. Fuquay, Secretary of the Commission, per copy attached hereto marked Exhibit A and made a part hereof. United answered the letter through its Counsel by letter addressed to the Secretary dated April 2, 1956, a copy of which is marked Exhibit B and attached hereto.

Pursuant to its filed tariff and Opinion 277, United issued billing on March 6, 1956 for natural gas delivered to Tyler Gas during the month of February 1956 per Exhibit C attached hereto and made a part hereof. Tyler Gas declined to pay said billing, instead deciding, without sanction of law or this Commission, to tender payment in full on some basis other than the filed rate contained in the applicable tariff, forwarding United letter dated March 30, 1956, a copy of which is marked Exhibit D attached hereto and hereof made a part, which was declined by

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United pursuant to its letter of April 13, 1956, marked Exhibit E attached hereto and hereof made a part. Even if the rate basis referred to in the Tyler Gas letter applied, which is denied, Tyler Gas could not and did not correctly prepare the billing. To illustrate: Calculation of applicable taxes could not be made in absence of ratio from United of Texas and Louisiana gas delivered. The billing reflects deviated volumes whereas the pre-conversion tariff contract specified its own conditions of pressure etc., so that Tyler Gas would have to undertake to "undeviate" such gas. The industrial delivery was on a percentage basis, and though the contract between Tyler Gas and its industrial cusomer McMurray Refining Company has changed, the pertinent and essential information required to be furnished, has not been delivered.

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The pre-conversion tariff contract required Tyler Gas to submit to United on or before the 5th day of the month following the billing month in question, various data concerning volumes of domestic gas, industrial gas, and volume delivered by Tyler Gas for which it rendered no billings, such unbilled gas to be classified as domestic and industrial. Obviously, the "tender" of Tyler Gas has no valid basis either in terms of the superseded contract nor the succeeding superseding rate schedules governing and controlling.

Thereafter on April 9, 1956 United forwarded its billing for the month of March 1956 in accordance with the terms of the filed tariff pursuant to Opinion 277, a copy of which is marked Exhibit F attached hereto and hereof made a part. Tyler Gas again declined to pay at the legal filed rate by its letter of April 30, 1956, a copy of which is marked Exhibit G attached hereto and hereof made a part. This was refused by United by its letter of May 4, 1956, a copy of

which is marked Exhibit H attached hereto and hereof made a part.

In Exhibits B, E and H, United advised Tyler Gas that it would not depart from the Regulations of this Commission which require United by Section 154.21 to charge and receive only the rate set out and prescribed in the effective tariff. Such Regulation, having the force of statute, is consistent with court decisions holding that a natural gas company may legally charge only the filed rate and that the obligation to so charge is complementary to that to so pay. In such letters, United called attention to tariff provisions providing for interest on late payments. 'Such interest will be charged as there provided unless prior to such applicable date or dates Tyler Gas pays the billings in accordance with the tariff on file.

Pursuant to such demands and anticipation of the institution by United of proceedings to compel Tyler Gas to pay at the filed rate, Tyler Gas filed the instant motion.

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All allegations in said motion are herewith denied unless expressly admitted in this answer.

United shows that the underlying circumstances controlling and requiring Tyler Gas to pay the filed and legal rate appear from the matters hereinafter set forth.

II

The Status of the So-called Contract

1. On January 3, 1941, United filed its FPC Rate Schedule No. 42 superseding FPC Rate Schedule No. 1. FPC Rate Schedule No. 42 was an agreement dated November 22, 1940 between Tyler Gas and United. Thereafter from time to time said FPC Rate Schedule No. 42 was amended and supplemented. Reference is made to said original agree-

ment and all amendments and supplements thereto constituting in the aggregate FPC Rate Schedule No. 42 on file with this Commission and by reference adopted as a part hereof.

On February 12, 1941 the Commission issued its order permitting the original agreement in FPC Rate Schedule No. 42 to be filed with a caveat in Paragraph (C) that nothing in the order "shall * * * be construed as constituting approval by this Commission of any rate, provision or condition contained in the contract herein;". Similar orders were issued upon the filing of each amendatory and supplemental agreement to FPC Rate Schedule No. 42.

The amendatory agreement upon which Tyler Gas seeks to anchor its contention in this motion is Supplement No. 4 filed June 17, 1946, being an agreement dated May 29, 1946. In the litigation hereafter mentioned Tyler Gas and United both joined in offering order of this Commission issued November 6, 1946 in which the caveat above described was amplified in Paragraph (C) thereof by the following

language:

> "Nothing contained in this order shall * * * be construed as constituting approval by this Commission of any service rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the above-designated rate schedules; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;"

This particular caveat was called to the attention of the courts in the litigation hereafter referred to, together with similar provisions now embodied in the Rules and Regulations of the Commission as indicating that the Commis-

sion permitted the filing only of the dollars and cents rate contained in said Supplement 4.

2. In accordance with Order 144 and Part 154 of the Rules and Regulations of the Commission, United on July 3, 1952 at Docket G-2019 filed its Conversion Tariff. The regulations prohibited, among other things and as contrary to the Act, percentage arrangements and automatic tax increase arrangements similar to those contained in Supplement 4 to FPC Rate Schedule No. 42 relied upon by Tyler Gas (Sec. 154.38 (d)(3)). Prior to the filing United had unsuccessfully contested the power of the Commission to so require by litigation reported under the styled *United Gas Pipe Line Company* vs. *Federal Power Commision,* 181 F. 2d 796, certiorari denied 340 U.S. 827. Upon such filing and on July 16, 1952, pursuant to notice from the Commission Tyler Gas forwarded to said Commission its objections to the Conversion Tariff termed in said objections as "proposed increases". Said protest and objections so dated, signed by J. W. Hickman, President of Tyler Gas, is in the records and archives of this Commission and is by reference adopted and made a part hereof.

In the case of *Tyler Gas Service Company and City of Tyler* vs. *United Gas Pipe Line Company,* C.A. No. 1662 on the docket of United States District Court for the Eastern District of Texas, Tyler Division, the effect of said Conversion Tariff

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on contract status between Tyler Gas and United was before that Court. Generally said suit was one for permanent mandatory injunction and declaratory judgment compelling United to perform the "contract" of FPC Rate Schedule No. 42, Supplement 4, as superior to the Act. In this litigation, the District Court rendered judgment adverse to the contentions of Tyler Gas declaring that the duty of United, a natural gas company, to obey and conform to the

requirements of the Act, particularly its obligation to propose change in rates to meet the declared public policies and requirements of Sections 4 (a) and (b) of said Act, was superior to and could not be affected, terminated or derogated by the private contract with Tyler Gas. This judgment was affirmed by the United States Court of Appeals for the Fifth Circuit at New Orleans in an opinion dated November 24, 1954 and reported at 217 F. 2d 73.

In its bill of complaint to said Court and in Paragraph X thereof, Tyler Gas and its assistant, the City of Tyler, alleged the filing of said Conversion Tariff and thereupon alleged:

> "The aforesaid alteration in the existing rate schedule was opposed and protested by Tyler Gas on the ground that same constituted a violation of the existing contract between United and Tyler Gas. Nevertheless, such revised rates were put into effect as of August 3, 1952, and charges were then made according thereto by United for gas sold and delivered to Tyler Gas from and after such date. Although said alteration in rates stipulated only a small decrease in the domestic rate and small increase in the industrial rate which had theretofore been charged Tyler Gas by United, and although such alteration did not materially affect the total consideration for gas sold by United to Tyler Gas which otherwise would have been payable according to the rates specified in their contract, Tyler Gas has not acquiesced in such alteration of rates or consented thereto. Tyler Gas promptly gave written notice to United that if did not consent to such change in rates from those specified in their contract and that any payments made pursuant thereto would be made under protest." (P. 17 TR of R No. 15034, Fifth Circuit, Tyler Gas, et al, Appellants vs. United Gas Pipe Line Company, Appellee.)

In its answer to said bill of complaint presented as an application for temporary injunction, United, among other defenses, moved to dismiss for want of

equity in the bill and inter alia set up: the compulsive requirements of Order 144 and Part 154 of the Rules and Regulations of the Commission; that Tyler Gas forwarded the objections and protests to the filing of the Conversion Tariff through its President, J. W. Hickman, hereinabove adopted by reference as a part hereof, that such objections were co-extensive with the allegations of the bill of complaint; that upon the filing of the Conversion Tariff at Docket G-2019, this Commission by order of July 31, 1952 in said docket, reference to which order in the records of this Commission is made, and by reference made a part hereof, accepted the filing of the Conversion Tariff applicable to Tyler Gas, and that by such order and action of the Commission, the protests and objections of Tyler Gas, contained in its protest of July 16, 1952, were denied and overruled; whereby such contentions of Tyler Gas were adversely adjudicated and "held to be no obstacle or impediment or ground of valid objection to the proper performance and consideration by the Federal Power Commission of its undoubted duty and obligation under the Natural Gas Act to fix and regulate rates; that Tyler Gas Service Company did not within the time permitted by Section 19 (b) of said Act assert that it was "aggrieved" by said order and seek a judicial review, whereby said order is now final and conclusive and binding on all of the parties hereto, and on this Honorable Court." (Printed Record Cause 15034, 5 CIR, P. 54-56). In this connection United refers to and adopts herewith as a part of this answer the "Motion to Dismiss and Answer of United Gas Pipe Line Company to Petition of Tyler Gas Service Company and City of Tyler" filed on October 26, 1955 at Docket G-9547 and by reference such motion to dismiss and answer, together with all exhibits is made a part hereof.

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Reference to the memorandum opinion of the District Court in said case, being Exhibit A to said motion and answer of United filed at Docket G-9547 shows that

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the District Court affirmed the contentions of United, and in adjudicating adversely to Tyler Gas the issue of the Conversion Tariff held:

> "Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with its customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.
>
> . . . . . .
>
> "The fact that the so-called "contract rates" agreed upon between the parties here at all times are subject to the approval of, and to modification or change by, the Commission is illustrated by the institution of the new 'conversion rates' directed by order of the Commission of July 31, 1953. While the change thus effected was not great dollar-wise, it nevertheless constituted a departure from the figures upon which the parties had agreed. Such new rates became the lawful ones by virtue of the order of the Commission mentioned above, and hence the provisions of the amended contract which purported to fix the rates for a long period of time in the future, and upon which plaintiffs base their claim for equitable relief, have not been in effect for a matter of several months." (P. 6, 13-4)

In presenting the issue to said Court, United relied upon the rationale and holding in *Sunshine Anthracite Coal*

Company v. *Atkins* (1940, 310 U.S. 381). The holdings of the District Court were approved and affirmed by the United States Court of Appeals for the 5th Circuit, cited supra. Tyler Gas did not apply to the Supreme Court of the United States for a writ of certiorari. Thus the judgments and decisions of both courts became final, binding and conclusive upon Tyler Gas and so remain. The judgments of the District Court and 5th Circuit and attached as Exhibits B and C to the motion and answer of United filed to the motion of Tyler Gas at Docket G-9547 to both of which references are made and hereof

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made a part.

As a result of said final and conclusive judgments, the contract relied upon by Tyler Gas is adjudicated to have been superseded and replaced by the Conversion Tariff of United and the applicable rate schedules and superseding schedules on file with this Commission. In this connection United shows that pursuant to the Commission's Rules and Regulations and particularly Part 154 thereof, United, upon the filing of its Conversion Tariff, filed, pursuant to Section 154.85 of such Rules and Regulations, a statement of those portions of FPC Rate Schedule No. 42 not in conflict with the provisions of said Rules and Regulations retained as an executed service agreement. Said statement dated May 29, 1952 is in the records and archives of this Commission and is by reference adopted as a part hereof. Said statement was filed with and as a part of said Conversion Tariff whereby the order of the Commission above described at Docket G-2019 permitted said Conversion Tariff to be filed, approved and adopted said statement pursuant to Section 154.85; and the judgments and decisions of the District and Appellate Court above described adjudicated said statement as controlling.

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In this connection United notes that Tyler Gas at page 2 and 3 of its motion quotes a portion of Footnote 3 from the opinion of Chief Judge Hutcheson in the above litigation but does not completely quote said footnote. Immediately following the end of the quotation at page 3 of Tyler's motion there follows in said opinion pertinent language now quoted for the benefit of the Commission:

"During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

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"About July 1, 1952, United filed with the Commission a schedule of rates (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff [so called because it converted United's schedule of rates from contract to tariff form as required by rules of the Commission], United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

"Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with the customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under

Sec. 19 of the Act was taken from such order.

"On June 24, 1953, United filed with the Commission another revision of its schedule or rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

"Upon the filing of the new proposal, by order of July 10, 1953, the Commission set a hearing for July 20, 1953, to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, 'In the Matters of United Gas Pipe Line Co.') in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until Dec. 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4 (e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expired Dec. 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953. * * *"

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3. On or about 25 June, 1953, United at Docket G-2210 filed Notice of Change of Increased Rates for certain classes of service including town border or city gate service rendered to Tyler Gas. By order of 10 July, 1953, (adopted by reference as a part hereof), the Commission

permitted IND-C, Large Volume Industrial Uses Only, for the Central Zone, Second Revised Sheet No. 31, and First Revised Sheet No. 32 to go into effect on 25 July, 1953 without suspension since under the express terms of the Act resale industrial rates could not be suspended. By the same order, Tariff DG-C, General Service Large Volume Distributors for the Central Rate Zone, First Revised Sheet Nos. 4 and 5, was suspended for review pursuant to Section 4 (e) of the Act and became effective on 25 December, 1953 on motion of United.

Tyler Gas filed petition to intervene on the ground that the filing was contrary to the contract (supplement 4) which contract (FPC Rate Schedule No. 42 as amended and supplemented, includng supplement 4), was held to be superseded and replaced by the judgment of the two courts above described.

Docket G-2210 was by Commission order consolidated with Docket G-1142, a proceeding instituted by the Commission under Section 5 (a) to investigate the justness and reasonableness of each and every rate of United with the announced purpose, if any rate or rates were found to be unjust or unreasonable, to fix, establish and declare the just and reasonable rate or rates thereafter to be enforced.

After intervention allowed and while said consolidated dockets were in course of hearing, Tyler Gas filed suit against United in the United States District Court for the Eastern District of Texas, Tyler Division, Civil Action 1662 for declaratory judgment that the contract of Supplement 4 of FPC Rate Schedule 42

as amended and supplemented, was valid and binding in every respect, and for mandatory injunction to compel

United to observe and perform such rate schedule contract as superior to the provisions of the Act and particularly Section 4. On trial, Tyler Gas freely admitted the power of this Commission, pursuant to Section 4, to change contract rates; the trial court so found and adjudged, saying:

> "While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is argued that this will simply retain the status quo until the Commission has time to act." (PA District Opinion Exhibit "A" to Motion and Answer of United to Motion of Tyler Gas in Docket G-9547 adopted by references.)

In the brief to the District Judge, Tyler Gas admitted that the adjudication and completion of hearing by the Commission of the review ordered at Docket G-2210, of the noticed Change of Increased Rates would per se be sufficient to change, supersede and replace contract provisions (even assuming such contracts not to be superseded as subsequently held by the District Court). Three examples from the District Court brief are selected as typical.

> "(a) 'In a word, the extent of the relief herein sought by the plaintiffs is simply the maintenance of the status quo of the existing rate schedules until such time as the Federal Power Commission shall have rendered an adjudication on the pending application of United for an increase in rates. • • • No question is raised as to the power vested in the Federal Power Commission to regulate the rates charged by United to Tyler Gas, nor do we question here the authority and prerogatives of the Federal Power Commission to modify or amend the rate schedule prescribed in the

existing contracts. * * * Furthermore, no attack is here made upon any other action heretofore taken by the Federal Power Commission. Simply stated, plaintiff's position is that inasmuch as the Federal Power Commission has not yet made a decision respecting the justness, reasonableness and lawfulness of the revised schedule of rates, the existing contract rates should be permitted to stand until such time as the Federal Power Commission does reach and announce a decision with reference to same." (p. 6-7)

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(b) "Expressly recognizing that the proposed increase in rates 'may be unjust or unreasonable or otherwise unlawful', by its order issued July 10 the Commission suspended said rates until December 25, 1953, and 'until such further time as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.' Thereby the Commission exhausted its statutory power to suspend and defer the effectiveness of such rates." (P. 18-19)

(c) "The filing of new rate schedules with the Federal Power Commission by Defendant without the consent of Tyler Gas on June 24, 1953, did not modify the contract between Tyler Gas and Defendant. To effectuate modification one of two things was necessary, namely, either failure of the Commission to act for a period of thirty days, or an order of the Commission permitting or requiring the proposed rates to become effective. Neither of these things took place. Instead, the Commission, acting under Section 4 (e) of the Act upon a finding that the new rates may be unjust and unreasonable, suspended their use for a period of five months, and ordered a hearing to be held respecting their justness, reasonableness and lawfulness. Under Section 4 (e) that power having been exercised, the proposed rates can become effective only upon an order of the Commission after the conclusion of the proceedings or upon a motion by Defendant made at the expiration of the suspension period, by which motion the suspension is lifted and

the rates become effective even though the proceedings to determine their lawfulness have not been concluded." (P. 30-1). (Pages 11-12)

United, as noted, moved to dismiss for failure of the bill of complaint to state grounds for equitable relief, some of the grounds of which pertinent to this motion may be summarized as follows:

(a) That United, a natural gas company in the light of the congressional purpose declared in Section 1 (a) of the Act and the public policy and mandate placed upon the Commission and required to be observed by the natural gas company as contained in Section 4 (a) and (b) could not validly and enforcibly make a contract which would prevent the natural gas company from discharging its duty to comply with such declared policy and mandate and that the provisions of Section 4 of the Act rose superior to private contract; were incorporated into said contract, even if made prior to passage of the Act and constituted no inhibition or impediment

to the duty of the natural gas company to propose a change in rates whenever and as often as necessary to meet the requirements of Sections 4 (a) and (b), nor could any such contract avoid, stay or divert the duty of this Commission as the statutory agent of the Congress to administer and enforce such policy and mandate.

(b) That said contract as amended and supplemented, Filed as FPC Rate Schedule 42

(1) was by the caveat of the orders of the Commission not permitted to be filed as governing and controlling the future conduct and duty of the parties insofar as any claimed contractual right was concerned, but solely as a

rate schedule exhibiting the then applicable monetary rates governing the service until changed.

(2) had been replaced and superseded by the Conversion Tariff so that the order of the Commission and the failure of Tyler Gas to appeal was res adjudicata of the supersession of said contract as amended and supplemented by said Conversion Tariff so that conditions of service and rates for said service were controlled by those portions retained as an executed service agreement pursuant to the statement under Section 15.185 and the Rate Schedule or Schedules, including the governing General Terms and Conditions, from time to time filed with the Commission.

(c) That perforce the law particularly as declared by the United States Supreme Court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company* (1951) 341 U.S. 246 the governing applicable rate contained in rate schedules could only be those rates made specific from time to time by the Commission in its administration of its statutory duties.

(3) The District Court held:

> "It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination

> and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. While it is no doubt an over-simplification of the problem, for present purposes it will suffice to say that the business of United is one charged with a public interest; hence, one in its position may not by private contract for future rates collect a rate which is found to be excessive, because such would be unfair to the consumer; neither may it bind itself to rates which are determined to be confiscatory,

because to permit such utility to charge and collect rates which are confiscatory of its own property would jeopardize its ability properly to serve the public in the future (Union Dry Goods Co. v. Georgia Pub. Serv. Co., 248 U.S. 372, and cases there cited).

"Thus the rate-fixing provisions of the United-Tyler Gas contract, as well as many other provisions thereof, are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with the governmental regulation or with public policy, the former must yield (Colo. Interstate Gas Co. v. Fed. Power Comm., 142 Fed. (2d) 943, aff. 324 U.S. 581, and cases there cited). In such cases, compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise to a cause of action in favor of the other, either for money damages (Miss. Power & Light Co. v. Memphis Natural Gas Co. (162 Fed. (2d) 388) or for specific performance (Mich. Consol. Gas Co. v. Panhandle Pipe Line Co., 173 Fed. (2d) 784).

"So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable—and hence lawful—is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates." (P. 9-11, Exhibit A "Motion to Dismiss and Answer of United Gas Pipe Line Co. to Petition of Tyler Gas Service Co. and City of Tyler, Texas, in Docket No. G-9547.")

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On the contention of Tyler Gas that the filing of noticed Change of Rates was a "unilateral" abrogation of contract the District Court held:

> "• • • The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates. United has followed the procedure prescribed by statute to secure this

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> review, and if it files the motion which plaintiffs allege it contemplates, and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (Hope Nat. Gas Co. v. Fed. Power Comm., 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the statute. Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service shall go into effect." (Emphasis added). It is not for this Court to add another proviso, reading "and where there is no private agreement or contract to the contrary." (P. 12-13, Exhibit A—Motion to Answer of United at Docket G-9547, supra)

In addition it has been shown that the Court held the Conversion Tariff replaced and superseded the contract which as such was no longer in effect.

4. The United States Court of Appeals for the Fifth Circuit identified the purpose and allegations of the bill of complaint as seeking:

> "• • • (1) a preliminary injunction to restrain United from putting the schedule into effect; (2) a judgment declaring the contracts to be in all things

valid, subsisting, and enforcible; and (3) enjoining the defendant from proposing or making effective any rates and charges in excess thereof." (217 F. 2d at P. 74)

Noting the concession of Commission power on final hearing to fix reasonable rates lower than contract rates, the Appellate Court noted Tyler Gas' contention "that unless and until the contracts sued on are set aside by some invalidity, or after a hearing before the Federal Power Commission, the contract rates are found by the Commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with lower rates." The Court then summarized their points on appeal against the District Court judgment as being contained:

"• • • in eight specifications of error, which ring the changes on what it claims is the fundamental error of the trial court, attack its holding that a public utility company may, by the simple expedient of filing a revised schedule with the Federal Power Commission, without a full hearing before and a finding by the Commission that such contract rates are unjust, unreasonable, or unlawful, disregard its solemn contracts fixing maximum rates." (217 F. 2d P. 76-7)

The Appellate Court stated that it did not think the District Judge had committed error, saying

"• • • We find ourselves, on the contrary, in agreement with the well considered and expressed views of the district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high

> they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission. (217 F. 2d P. 77)

The Court then declared that the decision of the District Judge that a filing pursuant to Section 4 (d) was not unilateral abrogation because in compliance with the Act was "correctly held."

Finally, it concluded that only the Commission was authorized to determine the proper and applicable rate and with that procedural provision expressed agreement with the decision of the Court of Appeals for the Third Circuit in *Mobile Gas Service Corp.* v. *Federal Power Commission* (215 F. 2d 883) but the Fifth Circuit was careful to state categorically the disagreement and conflict of its holding with that of the Third Circuit in *Mobile* and this was confirmed by the decision of United States Supreme Court that the Fifth Circuit reached "a contrary conclusion" (314 FPC Opinion, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* decided February 27, 1956). Though this conflict was apparent, Tyler Gas did not apply for rehearing or petition for writ of certiorari to the United States Supreme

Court on this or any other ground. Instead, it accepted the judgments and decisions against it which then became final. Thus, such decisions are obligatory upon Tyler Gas and United.

From the foregoing it is clear that Tyler Gas is bound and concluded by the final judgment and decision of United States District Court for the Eastern District of Texas and that of United States Court of Appeals for the Fifth

Circuit in the above-described litigation; that its claimed contract as amended and supplemented was superseded and replaced by United's Conversion Tariff; that said contract as amended and supplemented is no longer in effect as such; and that the statement pursuant to Section 154.85 of the Rules and Regulations of the Commission identifying, as required by the Regulations of the Commission, those portions retained as an executed service contract, together with the applicable Rate Schedule on file measures, governs and controls the terms and conditions of service to be rendered by United to Tyler Gas under the administrative regulatory control of the Commission pursuant to the Act and the money rates contained in the rate schedules governing. Such judgments are final judgments; are binding and conclusive upon Tyler Gas and are res adjudicata of the contentions sought to be raised and brought forward by it in the motion filed by it at Docket G-2210.

Such judgments together with Opinion 277 demonstrate that the claim of Tyler Gas for refund is wholly without merit and that it should be directed by this Commission forthwith to pay the billings for natural gas delivered. Such judgments furthermore clearly show that Dockets G-1142 and G-2210 should be immediately closed upon the rates there ordered for the effective period of such rates for the judgments and decision of such litigation for which the Commission held open such dockets as to Tyler Gas adjudge the legality of the filing, and do not order a result at variance with Opinion 277, they categorically, judicially affirm Commission freedom

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as between United and Tyler Gas to review and determine those there considered and any superseding, including those now under consideration at Docket G-9547.

III.

Status of Applicable Rates

5. It has been shown by the foregoing that by final adjudication conclusive and binding upon Tyler Gas its contract as contract which it claims herein was superseded in 1952 by the permitted filing of United's Conversion Tariff. Service and deliveries of natural gas since to Tyler Gas have been pursuant to the terms and conditions of those portions of the contract as amended and supplemented retained as an executed service agreement and the applicable Rate Schedules in United's FPC Gas Tariff filed with the Conversion Tariff and Rate Schedules hereafter described.

6. In 1948, the Commission by its own motion instituted an investigation pursuant to Section 5 (a) of the Act at Docket G-1142 involving all of United's rates.

On June 25, 1953 at Docket G-2210, United filed notice of Change of Rates for Town Border or City Gate, including that to Tyler Gas. In this notice, Tariff IND-C, Large Volume Industrial Use Only, for the Central Zone, Second Revised Sheet No. 31, First Revised Sheet No. 32; and Tariff DG-C, General Service Large Volume Distributors for the Central Rate Zone, First Revised Sheets Nos. 4 and 5 were applicable to Tyler Gas and other towns and cities. Reference is made to said sheets in said application the same as though such sheets set out herein.

On June 10, 1953, the Commission issued its order at Docket G-2210 suspending all but the industrial resale rates and instituting a review pursuant to Section 4 (e) of the Act, said order of July 10, 1953 by reference to the records and archives of the Commission and made a part hereof. The rates applicable to Tyler Gas at

Docket G-2210 became effective at the end of the suspension period, i.e., December 25, 1953 pursuant to motion filed by United.

7. After substantial hearings and while the case of Tyler Gas was on appeal to the United States Court of Appeals for the Fifth Circuit, the Staff of the Commission and United reached a reconciliation and agreement for settlement of all rates pursuant to the Section 5 (a) proceeding at Docket G-1142, which settlement was inclusive of the noticed Change of Increased Rates in all dockets consolidated with said Docket G-1142, including Docket G-2210 applicable to Tyler Gas. The hearings were recessed for informal conferences between the Staff of the Commission, United and all parties intervenor. Such informal conferences were presided over by Messrs. Lambert McAllister, then Assistant General Counsel of the Commission and Charles W. Smith then Chief of the Bureau of Rates and Accounts. In the course of these conferences the Staff of the Commission explained to all parties the investigation of the various sections and departments of the staff, the conclusions reached, the agreement of United subject to certain reservations and the analysis of the staff upon the proposals. Counsel for Tyler Gas in such informal conferences suggested some rearrangement in the Central Rate Zone covering service to Tyler Gas which resulted in agreement by the Staff that some additional adjustment was indicated to meet the suggestion the Counsel of Tyler Gas that such further adjustment would result in a more equitable and balanced adjustment producing a fairer assumption by the Central Rate Zone, of its fair share of the cost of service. The acceptance and agreement of United had been indicated to the Staff on a dollar figure contained in the Staff Exhibits which had

been prepared and which were then being presented to such informal conference. Whereupon Counsel for United at the request of Staff representatives contacted the officers of United and obtained consent to the rearrangement and changes which would result from the making of the

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adjustment suggested by Counsel for Tyler Gas.

Thereafter oral argument was had to the Commission which later issued its Opinion 277 on November 2, 1954 approving said settlement and ordering United to file rates and revisions to its FPC Gas Tariff to implement the adjustments made in rates in said consolidated dockets.

Respecting Tyler Gas the Commission noted in Opinion 277:

(a) "The terms of the proposed settlement have been agreed to by all parties, except Mississippi. Tyler and Tyler Gas have stated on the record their qualified acceptance of the terms of the proposed settlement subject to the outcome of litigation now pending in the United States Court of Appeals for the Fifth Circuit concerning the legality of United's filing at Docket No. G-2210 so far as it relates to sales to Tyler Gas." (P. 9)

(b) "Also, as noted previously, Tyler Gas and Tyler have accepted the proposed settlement with certain qualifications. These interveners at Docket No. G-2210 have stated that they do not object to the establishment of the rates proposed for sales by United in its Central Rate Zone except to the extent that their establishment is founded on the conclusion that such rates are lawful or just and reasonable for sales by United to Tyler Gas. Such interveners, proceeding on the theory that the rates provided in the existing contracts between United and Tyler Gas are binding upon United until set aside as

unjust and unreasonable in a proceeding under Section 5 of the Act, instituted a suit in the District Court of the United States for the Eastern District of Texas, Tyler Division, in Civil Action, No. [illegible]62, styled *Tyler Gas Service Company, et al*, vs. *United Gas Pipe Line Company*, to enjoin United from moving to put into effect rates filed at Docket No. G-2210 applicable to Tyler Gas. Upon dismissal of such action by the District Court, Tyler Gas and City of Tyler noted an appeal to the United States Court of Appeals for the Fifth Circuit. That appeal is now pending." (P. 20)

(c) "Similarly, in view of the appeal noted by Tyler Gas and Tyler in the United States Court of Appeals for the Fifth Circuit and the allegations in their petitions to intervene, we shall provide that the proceedings at Docket No. G-2210 also remain open for the determination of the issues raised in said petitions to intervene by Tyler Gas and Tyler. Accordingly, the suspension of the rates and charges of United to Tyler Gas shall continue subject to

the undertaking and refund, but we shall stay our orders at Docket No. G-2210 to the extent that Tyler Gas is required to pay more than the proposed settlement rates applicable to it." (P. 21)

In its Order in Opinion 277 the Commission directed:

(d) "(C) The provisions of the * * * orders issued at Docket No. G-2210 on July 10, 1953, and January 25, 1954, relating to Rate Schedules DG-C and G-C in so far as they are applicable to sales of natural gas to Tyler Gas shall continue in full force and effect until further orders of the Commission, *Provided, however*, That the effect of the order issued on January 25, 1954, at Docket No. G-2210 be and it is hereby stayed to the extent that it requires Tyler Gas to pay more than 17¢ per Mcf for gas purchased under the first block of Rate Schedule DG-C and more than 12.5¢ per Mcf under the second block

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thereof, and more than 16¢ per Mcf for all gas purchased under Rate Schedule G-C, all as provided in the settlement, pending determination of the issues raised by Tyler Gas and Tyler in their petitions to intervene; and *Provided further*, That Tyler Gas shall not be required to pay United more than 12.5¢ per Mcf for all gas purchased under Rate Schedule IND-C." (PP. 32-33)

(e) "(1) The rate investigation proceeding instituted by the Commission in Docket No. G-1142, as heretofore described, be and the same is hereby dismissed and terminated in all respects except in so far as it relates to the rates and charges applicable to Mississippi, Tyler Gas, and to Mobile for resale to Ideal Cement Company for industrial use." (P. 35)

(f) "(O) The proceedings in Docket Nos. G-2019, G-2074, G-2210, G-2220, and G-2378 be and they are hereby terminated in all respects, except that. * * * (2) the proceedings in Docket G-2210 shall remain open for the purpose of * * *, and (b) in view of the pending appeal of Tyler Gas and Tyler in the United States Court of Appeals for the Fifth Circuit, referred to previously, and their petitions to intervene in the proceedings in Docket No. G-2210, determining the matters involved and issued presented by the petitions to intervene of Tyler Gas and Tyler." (PP. 36-37)

By Paragraph (P) (P. 37) United was required within 30 days to file a writing signed by a responsible officer, under oath, accepting the terms and conditions of the Order in Opinion 277, which was done.

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Since, United has delivered natural gas to Tyler Gas under the terms and conditions of service contained in the executed service agreement and the rate schedule and tariff pursuant to Opinion 277 and the billing attached as

Exhibits C and F hereto are billings computed in accordance with the directions of this Commission in Opinion 277.

8. On September 30, 1955 United filed notice of Change by Increase of Rates at Docket G-9547 which the Commission by order issued October 26, 1955, adopted by reference as a part hereof, suspended and ordered reviewed in accordance with the terms and provisions of Section 4 (e) of the Act. Such suspension period expired as of April 1, 1956 and became effective on April 1, 1956 upon the filing of motion pursuant to Section 4 (e) of the Act, said date being the end of the suspension period. After such filing Tyler Gas filed a motion to dismiss at said Docket G-9547 to which reference is made for the purpose of showing that the issues there sought to be presented are identical with those concluded adversely for Tyler Gas by the judgments and decisions of the two courts in the Tyler Gas litigation above prescribed. To that United filed a motion to dismiss and answer in said Docket G-9547 to which reference is made and adopted as a part hereof. Hearings are now in progress upon the changes noticed by such filing.

It is to be noticed in terms of Opinion 277, that the Courts in the Tyler Gas litigation adjudged:

(a) That United's filing of G-2210, and any filing pursuant to Section 4 (d) was a lawful filing not prohibited or rendered unlawful by the "contract" with Tyler Gas;

(b) That United's freedom and duty to file was not restricted or prevented by the "contract".

(c) That the Commission possessed ample power to determine upon such filing or otherwise the proper rate level

applicable to United's delivery of gas to Tyler Gas, i.e., the just and reasonable rate to be charged; and

(d) That such adjudication finally determines such relationship as between United and Tyler Gas growing out of the contract, and continuing under the Conversion Tariff filed under the Regulations issued by the Commission pursuant to the Act which Regulations are legislative in character thus having the force and effect of statutes.

By virtue of the foregoing matters the applicable rates and Rate Schedules contained in the Tariff on file and by order of the Commission are not subject to doubt. Tyler Gas is required to pay the billing reflected by Exhibits C and F hereto and is and will be subject to interest upon late payments in accordance with the terms and provisions of the Tariff Rate Schedule and the General Terms and Conditions. Tyler Gas should be and United respectfully prays that the Commission do forthwith order and require Tyler Gas to pay such billings so rendered in accordance with the filed and legal rate.

IV.

Mobile's Case Gives Tyler No Assistance

Tyler seeks to rely upon the opinion of United States Supreme Court filed February 27, 1956 in the case of *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation* but such opinion does not assist Tyler.

The opinion of the District Court in Tyler's case was filed December 29, 1953. The judgment of that Court was dated January 26, 1954 (See Exhibit B, "Motion to Dismiss and Answer of United Gas Pipe Line Company to Petition of Tyler Gas Service

Company and City of Tyler, Texas"). The decision of the United States Court of Appeals for the Fifth Circuit in Tyler's case was dated November 24, 1954 (See 217 F. 2d 73). The judgment of the Fifth Circuit was entered the same day (See Exhibit C to Motion of United Answering Tyler's Motion in Docket G-9547).

The time within which Tyler Gas could apply to the United States Supreme Court for writ of certiorari to the decision of the Fifth Circuit expired on February 23, 1955, there being no such application, the judgments and decisions by the two courts became final and thereby binding and conclusive upon Tyler Gas. This was more than a year before the United States Supreme Court handed down on February 27, 1945 its decision in the *Mobile* case. The proposition which Tyler Gas advances to the Commission is that it should be relieved from the onus of an adverse judgment by which it is conclusively bound and cut off because another party in another suit to which it was not a party and which it claims involves the same issue procured a contrary result. Such contention is without basis at law. Tyler Gas is bound and concluded by the adverse judgments against it in the litigation which it filed and which rule the determination of the issues now sought to be raised. Such judgments and decisions estop it from asserting anything to the contrary.

Wherefore premises considered, United prays judgment of the Commission of this its Answer that the same be sustained; that the motion of Tyler Gas be in all things denied; that Tyler Gas be forthwith ordered and directed to pay the billings of United in accordance with the filed rates hereinabove identified until such time as such rates may be superseded and replaced by rates filed with

the Commission as required and permitted by the Act.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY

By /s/ THOMAS FLETCHER
Thomas Fletcher
Its Attorney of Record

Counsel for Applicant:
WILBERT O. CRAIN
GEORGE D. FISER
P. O. Box 1407
Shreveport, Louisiana

THOMAS FLETCHER
11th Floor, Esperson Building
Houston, Texas

C. HUFFMAN LEWIS
P. O. Box 1707
Shreveport, Louisiana

UNITED STATES OF AMERICA }
DISTRICT OF COLUMBIA } ss:

Personally came and appeared before me the undersigned, duly qualified and acting Notary Public, Thomas Fletcher, who being by me, Notary, first duly sworn, deposes and says:

That he is Its Attorney of Record to United Gas Pipe Line Company and is duly authorized to make this affidavit and that the facts set forth and the allegations made in the above and foregoing Answer to Motion on behalf of

United Gas Pipe Line Company are true and correct to the best of his knowledge and belief.

/s/ THOMAS FLETCHER
Thomas Fletcher

SWORN TO AND SUBSCRIBED before me on this 23rd day of May, 1956.

/s/ GENEVIEVE M. FOREMAN
Notary Public, District of Columbia

My commission expires: Sept. 1, 1957

NOTARY SEAL

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CERTIFICATE OF SERVICE

I, Thomas Fletcher, certify that on the 23rd day of May, 1956, I served the foregoing Answer of United Gas Pipe Line Company to "Motion of Tyler Gas Service Company for Order Directing Refund" by mailing a true copy thereof, postage prepaid, to the following:

J. W. Hickman
Southwestern Life Building
Dallas, Texas
President, Tyler Gas Service Company

Thomas B. Ramey, Esq.
Citizens National Bank Building
Tyler, Texas
Counsel for Tyler Gas Service Company

Bryce Rea, Jr., Esq.
Munsey Building
Washington 4, D. C.
Counsel for Tyler Gas Service Company

/s/ THOMAS FLETCHER
Thomas Fletcher

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EXHIBIT A

Law Offices

WATKINS & REA

Munsey Building-Washington 4, D. C.
DIstrict 7-3551

March 26, 1956

Edgar Watkins
Bryce Rea, Jr.
Donald E. Cross

Of Counsel
Clyde B. Aitchison

Mr. Leon M. Fuquay, Secretary
Federal Power Commission
441 G Street
Washington, D. C.

Re: Tyler Gas Service Company
Dockets G-2019, G-2210 and G-9547

Dear Mr. Fuquay:

As you know, on February 27, 1956 the Supreme Court of the United States rendered its opinion in *Federal Power Commission* v. *Mobile Gas Service Corporation* and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*. (Nos. 31 and 17, October, 1955 term). 100 L. Ed. (Adv.) 291, 24 Law Wk. 4090. The Court held, *inter alia*, that "the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally", and that an increased rate schedule filed in violation of a contract is "a nullity insofar as it purport[s] to change the rate set by [the] contract .... and that the contract rate remain[s] the only lawful rate."

Tyler Gas Service Company has been and is now purchasing gas from United Gas Pipe Line Company pursuant to a contract first entered into on November 22, 1940

and amended on May 29, 1946. That contract does not permit United to increase its rates for sales to Tyler Gas. Notwithstanding this contract, United, purporting to act pursuant to Section 4(d) of the Natural Gas Act, filed changes in rates applicable to Tyler Gas in Docket G-2019, Docket G-2210 and again in Docket G-9547. Tyler Gas protested by letter the change in rate in Docket G-2019 and intervened in Docket G-2210, challenging, *inter alia*, the legality of United's action.

The Commission took no action as such on the letter of protest in Docket G-2019, but its Order issued August 1, 1952, permitting the rate changes to become effective, recited that it was not approval of any "service, rate, charge, classification, or any rule, regulation, contract, or practice" and was "without prejudice to any findings or orders which may . . . hereafter be made by this Commission in Docket No. G-1142, Docket No. G-1158, and in any proceeding now pending, or hereafter instituted, by or against United Gas Pipe Line Company." The Commission's Opinion and Order No. 277 in Docket G-2210 took cognizance of the position of Tyler Gas and specifically left Docket G-2210 open on the issues raised by Tyler Gas in its petition to intervene.

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In Docket G-9547 Tyler Gas filed a petition for an order rejecting United's filing as to it. No action has been taken by the Commission on that petition and it is still pending. Tyler Gas also filed a petition to intervene which was granted. In both its petition for rejection and its petition for intervention Tyler Gas challenged the legality of United's filing as to it.

In view of the Supreme Court's holding in the *Mobile* case that a filing under Section 4 of the Natural Gas Act in violation of a contract is void, it is clear that United's filings in Docket G-2019, Docket G-2210 and Docket G-9547

are void insofar as they purport to apply to sales by United to Tyler Gas. It follows that the only legal rates for sales by United to Tyler Gas are the rates that were in effect on August 2, 1952, the day before any of the changes in rates proposed in Docket G-2019 became effective. For that reason Tyler Gas is demanding of United refund with interest at 6% of all amounts paid by Tyler Gas to United in excess of the amounts due under the legal rates and is notifying United that it will henceforth pay no more than the legal rates.

In order that the public records of applicable rate schedules kept by the Commission pursuant to Section 4(c) of the Natural Gas Act may be accurate, it would seem appropriate that the Commission issue orders rejecting United's filings in Dockets G-2019, G-2210 and G-9547 insofar as they purport to be applicable to Tyler Gas. It is suggested that the Commission, in accord with the *Mobile* case, can issue such orders on its own motion pursuant to Section 16 of the Act, providing for the issuance of orders "necessary or appropriate to carry out the provisions of this Act." In any event, it would seem that the petition for rejection filed by Tyler Gas in G-9547 provides an appropriate vehicle for such orders if such a vehicle is desirable.

Copies of this letter have been sent today to United Gas Pipe Line Company, to Thomas Fletcher, Esq. and C. Huffman Lewis, Esq., attorneys for United, and to Troy Smith, Esq., Attorney for the City of Tyler, Texas.

Respectfully,

/s/ Bryce Rea, Jr.
Bryce Rea, Jr.
Counsel for Tyler Gas Service Co.

BR/ps

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EXHIBIT B

April 2, 1956

Mr. Leon M. Fuquay, Secretary,
Federal Power Commission,
441 G Street, N. W.,
Washington, D. C.

Re: Tyler Gas Service Company
Dockets G-2019, G-2210 and G-9547

Dear Mr. Fuquay:

United Gas Pipe Line Company has received a copy of a letter dated March 26, 1956, from Mr. Bryce Rea, Jr., as Counsel for Tyler Gas Service Company, to you covering the above dockets. The position of United Gas Pipe Line Company in respect of the matters set out in Mr. Rea's letter has been fully stated to the Commission in the above docket numbers, because of which United does not deem a detailed reply to the letter necessary. Certain things, however, need to be called to your attention:

1. Tyler Gas Service Company does not purchase natural gas from United pursuant to the contracts set out in said letter. In the case of *Tyler Gas Service Company, et al*, v. *United Gas Pipe Line Company*, C. A. No. 1662 in the United States District Court for the Eastern District of Texas, Tyler Division, the Court held that such contracts were superseded by the conversion tariff of United. This decision, together with other holdings, was affirmed by the United States Court of Appeals for the Fifth Circuit. Tyler Gas Service Company accepted the correctness of said judgment, and did not petition to the United States Supreme Court for writ of certiorari. Said judgment and decision, including among other things the holding just described, became final in the early part of

1954. Said judgment by which Tyler Gas Service Company is bound, is not and cannot be

affected by the subsequent decision of the United States Supreme Court in the *Mobile* case cited in Mr. Rea's letter.

2. In the settlement of Dockets G-2019, et al, the appeal of Tyler Gas Service Company to the Court of Appeals for the Fifth Circuit was then pending, and Tyler's reservation approved by the Commission, was a reservation based upon the appeal which went adversely to Tyler Gas. Tyler thus is bound to pay the filed rates which are the only legal rates. United by the Rules and Regulations of the Commission and applicable decisions can only make service to Tyler Gas at such filed rates. Accordingly, Tyler Gas must pay the filed rates and none other.

3. The position of United has been fully set out in its motion to dismiss and answer to a motion filed by Tyler Gas Service Company at Docket G-9547, seeking a Commission order rejecting an order filed in Docket G-9547 as the same is applicable to Tyler Gas. Reference is made to said motion to dismiss and answer of United and adopted as a part of this letter.

The suggestions of the letter of March 26, 1956, like the motion filed at Docket G-9547, should be by the Commission denied.

Very truly yours,

THOMAS FLETCHER
Attorney for United Gas Pipe Line Company

TF:ec

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EXHIBIT C

Date March 6, 1956

UNITED GAS PIPE LINE COMPANY

P. O. Box 5611
Dallas 22, Texas

To: Tyler Gas Service Company
Tyler
Texas

Invoice No. .....

We charge your account for gas delivered at Tyler, Texas during the contract month of February 1956 as follows:

Tyler Town Border	419,303 MCF		
Country Customers	9,167 MCF		
	428,470 MCF		
1. McMurrey Refining Company Volume delivered under Rate Schedule IND-C	127,285 MCF	@ 16.58	$21,002.03
Plus BTU adjustment $\frac{1107-1000}{10} = 10.7\%$			2,247.22
			$23,249.25
2. Balance delivered under Rate Schedule DG-C 301,185 MCF			
A. Billing demand 20,290 x 8 = 162,320 MCF			
B. Volume up to 8 times billing demand	162,320 MCF	@ 17¢	$27,594.40*
C. Volume in excess of 8 times billing demand	138,865 MCF	@ 12.5¢	17,358.13
	428,470 MCF		$68,201.78

* Minimum bill would be:
20,290 MCF @ 45¢ $9,130.50

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EXHIBIT D

TYLER GAS SERVICE COMPANY

Tyler, Texas

March 30, 1956

United Gas Pipe Line Co.
P. O. Box 5611
Dallas 2, Texas

Gentlemen:

Enclosed herewith is check of Tyler Gas Service Company in the amount of $47,278.62, in payment for gas received from you during the period from February 1, 1956, to February 29, 1956, inclusive.

The amount owing United by Tyler Gas has been computed on the basis of the rates which are provided in the existing contract between United and Tyler Gas of November 22, 1940, as amended May 29, 1946, which was duly approved by the Federal Power Commission.

The increased rate filings of United in FPC Docket G-2019, FPC Docket G-2210, and FPC Docket G-9547 are void in so far as they purport to apply to any sales of gas by United to Tyler Gas Service Company, since they were made unilaterally by United without the consent of Tyler Gas and in violation of said contract. Inasmuch as United's said increased rate filings are void, it follows that the only legal rates for sales by United to Tyler Gas are the rates stipulated in said contract.

In view of the foregoing Tyler Gas Service Company is entitled to refund from United Gas Pipe Line Company of all moneys which it has paid for gas in excess of the amounts that were due to have been paid on the basis of said contract, which excess amounts Tyler Gas has paid to United under protest. Therefore, Tyler Gas Service Com-

pany hereby makes demand upon United Gas Pipe Line Company for refund, with interest at 6% per annum on the amount of such excess payments heretofore made for gas purchased by Tyler Gas from United since August 2, 1952, same being the day before the first of the aforesaid unlawful increases in rates by United was made effective.

Very truly yours,

TYLER GAS SERVICE COMPANY
By /s/ F. F. WIGGS

FWW:eg
Encl.

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EXHIBIT E

April 13, 1956

REGISTERED MAIL: RETURN RECEIPT REQUESTED

Tyler Gas Service Company
Tyler, Texas
Attention: Mr. F. F. Wiggs

Gentlemen:

We return herewith your check No. 16,550 contained in your letter of March 30, 1956, drawn on the Citizens National Bank of Tyler, Texas, dated March 30, 1956, for $47,278.62. The total amount of United Gas Pipe Line Company's billing to you (Invoice dated March 6, 1956) was $68,201.78, whereas the amount of your check above described is $47,278.62, and therefore the total billing has not been paid by said check.

The notations on the face of the check make it perfectly clear that you intend this check in full payment of all amounts due United Gas Pipe Line Company for the period covered by its billing to you. It also appears from the above that you have deducted $20,923.16 because you do not agree with the legal rates on file with the Federal Power Commission as applicable to the service rendered

to you. Therefore you have made it legally impossible for United Gas Pipe Line Company to accept said check without waiving the amount due as reflected by the billing.

In Civil Action No. 1662 which you filed against United Gas Pipe Line Company in the United States District Court for the Eastern District of Texas at Tyler, Texas, that Court held that the contract between Tyler Gas Service Company and United Gas Pipe Line Company dated November 22, 1940, as amended May 29, 1946, was replaced and superseded by the conversion tariff which United Gas Pipe Line Company filed in accordance with the Rules and Regulations of the Federal Power Commission at Docket G-2019 on July 3, 1952. This judgment and decision was affirmed by the United States Court of Appeals for the Fifth Circuit in response to your appeal. You accepted these judgments and decisions as correct, as evidenced by your failure to apply to the United States Supreme Court for writ of certiorari, and thereby the judgments of both Courts became final.

The rate at which the current bill was computed is the filed and legal rate. Under applicable court decisions and the Rules and Regulations of the Federal Power Commission United Gas Pipe Line Company is required to charge and collect the applicable rates covering the service rendered to you, and you are obligated to pay at the filed rate. Any other payment is unlawful.

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Your attention is directed to Original Sheet 87 of United Gas Pipe Line Company's FPC Gas Tariff Original Volume No. 1; and to Original Sheet 67 of United Gas Pipe Line Company's FPC Gas Tariff First Revised Volume No. 1 superseding.

You are requested immediately to pay the full amount of the billing sent you by United Gas Pipe Line Company for the period in question.

United Gas Pipe Line Company expressly reserves all of its rights, privileges and actions in the premises.

Very truly yours,

UNITED GAS PIPE LINE COMPANY
By /s/ A. D. GREENE
Executive Vice President

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EXHIBIT F

Date April 9, 1956

UNITED GAS PIPE LINE COMPANY

P. O. Box 5611
Dallas 22, Texas

To: Tyler Gas Service Company
Tyler, Texas

Invoice No. .....

We charge your account for gas delivered at Tyler, Texas during the contract month of March 1956, as follows:

Tyler Town Border	388,557 MCF		
Country Customers	8,466 MCF		
	397,023 MCF		
1. McMurry Refining Company Volume delivered under Rate Schedule IND C	138,952 MCF	@ 16.5¢	$22,927.08
Plus BTU adjustment 1698-1000 = 9.8% / 10			2,246.85
			$25,173.93
2. Balance delivered under Rate Schedule DG C 258,071 MCF			
A. Billing demand: 20,290 x 8 = 162,320 MCF			
B. Volume up to 8 times billing demand	162,320 MCF	@ 17¢	$27,594.40*
C. Volume in excess of 8 times billing demand	95,751 MCF	@ 12.5¢	11,968.88
	397,023 MCF		$64,737.21

* Minimum bill would be:
20,290 MCF @ 45¢ $9,130.50

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EXHIBIT G

Tyler Gas Service Co.
P. O. Box 989 — 214 W. Ferguson
Tyler, Texas

F. F. Wiggs
General Mgr.

April 30, 1956

United Gas Pipe Line Company
Shreveport, Louisiana
Attention Mr. A. D. Greene

Gentlemen:

Enclosed herewith is check of Tyler Gas Service Company in the amount of $38,582.97, in payment of gas received from you during the period from March I to March 31, 1956, inclusive. This amount has been computed on the basis of the rates which are provided in the existing contract between United and Tyler Gas of November 22, 1940, as amended May 29, 1946, which was duly approved by the Federal Power Commission.

As you are aware, this company has consistently maintained that said contract rates are the only lawful rates which United is authorized to charge for gas purchased by Tyler Gas. In virtue of the fact that our position recently has been sustained by the Supreme Court of the United States in what are commonly called the Mobile Case and the Sierra Case, we are unable to understand how you can still insist upon payment on any other basis.

We regret that you saw fit to return our check in payment of gas purchased for the month of February, and we herewith retender same to you. We can not at all agree with the statements contained in your letter of April 13 that there has been any determination, judicial or otherwise, that our existing contract has been replaced or superseded.

Consequently, we hope that upon reconsideration of the situation you will accept payment for gas purchased on the contractual basis.

Very truly yours,

TYLER GAS SERVICE COMPANY

/s/ F. F. WIGGS

By F. F. Wiggs

FFW:lt
Enclosure

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EXHIBIT H

May 4, 1956

Tyler Gas Service Company
Tyler, Texas

Attention: Mr. F. F. Wiggs

Gentlemen:

Acknowledgment is made of your letter of April 30, 1956 returning your Check No. 16550 in the sum of $47,278.62 and enclosing your Check No. 0010 drawn on Citizens First National Bank of Tyler and dated April 30, 1956 payable to the order of this company for $38,582.97.

Check No. 16550 is again returned herewith to you. Said check is not for the correct amount and does not pay the billing forwarded to you. Check No. 0010 is returned for the same reason. The billing for the gas delivered to you from March 1 to March 31, 1956, inclusive, was $64,737.21. Check No. 0010 therefore lacks $26,154.24 of paying the billing.

These checks are returned to you for the reasons set forth in our letter to you of April 13, 1956 to which you are respectfully referred. Demand is herewith made that the correct amount of these billings be forthwith paid.

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Your attention is again directed to Original Sheet 87 of United Gas Pipe Line Company's FPC Gas Tariff, Original Volume No. 1; and to Original Sheet 67 of United Gas Pipe Line Company's FPC Gas Tariff, First Revised Volume No. 1 superseding.

Pursuant to the provisions of the Natural Gas Act and of the rules and regulations of the Federal Power Commission issued pursuant thereto, this company can only accept from you and you are obligated to pay the filed and legal rate. United Gas Pipe Line Company does not intend to violate such rules and regulations and the law covering in such respects, nor does it propose to deliver natural gas and the service thereof to you on terms other than those covered by the rate schedules and the tariff sheets applicable thereto and the rules and regulations of the Commission.

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A copy of this letter, together with a copy of our letter of April 13, 1956, is this day being forwarded to Mr. Leon M. Fuquay, Secretary of the Federal Power Commission for the notice and information of the Commission, together with notice to the Commission of the demand of this letter that you pay the two billings for the services rendered in accordance with the applicable filed rate.

Very truly yours,

UNITED GAS PIPE LINE COMPANY

/s/ A. D. GREENE
Executive Vice President

ADG:O'D

cc: Mr. Leon M. Fuquay, Secretary
Federal Power Commission
Washington, D. C.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby and William R. Connole.

Docket No. G-10592

In the Matter of
UNITED GAS PIPE LINE COMPANY

Order Suspending Revised Tariff Sheets and Fixing Date of Hearing

(Issued June 15, 1956)

United Gas Pipe Line Company (United), on May 15, 1956, tendered for filing Second Revised Sheets Nos. 1, 4, 6, 10, 12, 16, 17, 17-A, 18, 19, 20, 21, 23, 25, 27, 28, 30, 32, 99, 100, 101, 102, 103, and 104 to its FPC Gas Tariff, First Revised Volume No. 1, proposed to take effect as of June 16, 1956. By said filing United proposes a general rate increase for all of its sales of natural gas for resale, subject to the jurisdiction of the Commission, except for sales in the isolated Mississippi Zone. No increased rate was proposed for the transportation of gas for others. It is estimated that the increase in rates will be approximately $5,856,000 per year, or an increase of 7.1 per cent over the rates pending in Docket No. G-9547.

United bases part of its proposed rate increase on claimed increases in the cost of purchased gas which are expected to occur by August 31, 1956. The extent to which United's claimed purchased gas costs will be realized cannot now be determined. Additionally United is claiming a rate of return of 6½ per cent and associated income taxes, acquisition adjustment costs, and allocations of costs

which do not appear justifiable. The proposed rate structure is also questionable. These, as well as other items of cost, have not been adequately established, and it appears that the increased rates and charges proposed in United's filing have not been shown to be justified, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful.

The Louisiana Public Service Commission, as well as several customers of United, request that the proposed rates be suspended and investigated, and that a hearing be held to determine just and reasonable rates. Willmut Gas and Oil Company and Tyler Gas Service Company jointly with the City of Tyler, Texas, customers of United, have filed petitions

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for an order rejecting United's filing of May 15, 1956 on the basis of the decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., et al.*, 350 U.S. 332 and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. Another customer of United, Mississippi Valley Gas Company, filed a motion to reject United's proposed increases in rates as to it, Texas Gas Transmission Corporation and Southern Natural Gas Company, predicating the motion on the *Mobile* case. The City of Memphis, Tennessee and the Memphis Light, Gas and Water Division filed joint motions to reject, cancel and dismiss the filing insofar as it would apply to Texas Gas. Southern Natural filed an answer in opposition to Mississippi Valley's motion.

The Commission *finds:*

It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act that the Commission enter upon a

hearing concerning the lawfulness of the rates of United and the increased rates proposed in its filing of May 15, 1956, and that the above-designated tariff sheets[1] be suspended and the use thereof deferred as hereinafter ordered.

The Commission *orders:*

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by Sections 4, 5, 15 and 16 of the Natural Gas Act and the Commission's General Rules and Regulations, including Rules of Practice and Procedure (18 CFR, Chapter 1), a public hearing hereby is set to commence on September 24, 1956 at 10 a.m. (EDST) in a Hearing Room of the Federal Power Commission, 441 G Street, N. W. Washington, D. C., concerning the lawfulness of the rates and charges of United and as proposed by United in its filing of May 15, 1956.

(B) Pending such hearing and decision thereon, United's proposed Second Revised Sheets 1, 4, 6, 10, 12, 21, 23, 25, 27, 28, 30,

32, 99, 100, 101, 102, 103 and 104 to its FPC Gas Tariff, First Revised Volume No. 1, be and the same hereby are suspended and the use thereof deferred until November 16, 1956, and until such further time as they may be made effective in the manner prescribed by the Natural Gas Act.

(C) United shall serve upon each party to this proceeding copies of the testimony and exhibits it proposes

[1] Second Revised Sheets Nos. 16, 17, 17 A, 18, 19 and 20 to FPC Gas Tariff, First Revised Volume No. 1 appear to pertain to sales of gas for resale for industrial use only and therefore may not be suspended pursuant to Section 4 of the Natural Gas Act.

to offer in the hearing provided in paragraph (A) above, including five (5) copies thereof upon Commission Staff Counsel. Such copies of the testimony and exhibits shall be served at such time as to permit delivery to all parties, including Staff Counsel, not later than September 17, 1956.

(D) Interested State commissions may participate as provided by Sections 1.8 and 1.37 (f) of the Commission's Rules of Practice and Procedure (18 CFR 1.8 and 1.37 (f)).

(E) This order is without prejudice to any decision which may hereafter be made by this Commission on the issues raised in the pending motions and petitions in the proceedings in Docket No. G-9547 which were argued before the Commission on May 25, 1956, nor to any decision which may hereafter be made by the Commission on the issues raised in the above-mentioned motion of Mississippi Valley Gas Company, the above-mentioned joint motions of the City of Memphis, Tennessee and the Memphis Light, Gas and Water Division, the above-mentioned petitions of Willmut Gas and Oil Company, and Tyler Gas Service Company and the City of Tyler, Texas, filed and pending herein.

By the Commission.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-10592

In The Matter Of

UNITED GAS PIPE LINE COMPANY, TYLER GAS SERVICE COMPANY AND CITY OF TYLER, TEXAS

Petition of Tyler Gas Service Company and City of Tyler, Texas for Order of Federal Power Commission Rejecting Rate Filing of United Gas Pipe Line Company

Come now Tyler Gas Service Company and City of Tyler, Texas, pursuant to Rule 1.7 of the Rules of Practice and Procedure of the Federal Power Commission and file this their Petition for the issuance of an Order pursuant to Section 16 of the Natural Gas Act rejecting, insofar as they are proposed to be applied to sales of gas to Tyler Gas, the increased rates filed May 15, 1956 to be effective June 16, 1956, by United Gas Pipe Line Company. In support of this Petition Tyler Gas and City of Tyler state as follows:

1. The names and addresses of all persons upon whom it is requested that copies of any notices, motions, orders or other documents in this proceeding be served are:

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J. W. Hickman, President
Tyler Gas Service Company
Southwestern Life Building
Dallas, Texas

Thomas B. Ramey
Citizens National Bank Building
Tyler, Texas

Bryce Rea, Jr.
Munsey Building
1329 E Street, N. W.
Washington 4, D. C.

J. W. Crosland
1100 Republic National Bank Building
Dallas 1, Texas
Counsel For Tyler Gas Service Company and City of Tyler, Texas

Troy Smith
Citizens National Bank Building
Tyler, Texas
City Attorney of Tyler, Texas

2. Tyler Gas Service Company is a public utility enfranchised by the City of Tyler, Texas, to distribute natural gas in the City.

3. The City of Tyler, Texas is a municipal corporation of the State of Texas. It has authority to exercise and in fact exercises authority to enfranchise public utilities to serve the City of Tyler and to regulate the terms, conditions and rates under which public utilities render service in the City.

4. Tyler Gas purchases all of the gas it distributes from the United Gas Pipe Line Company pursuant to a contract first entered into between Tyler Gas and United on November 22, 1940. This contract was amended on May 29, 1946. The amended contract reduced the rates paid United by Tyler Gas for gas sold for resale for both domestic and industrial use, and committed United not to increase the rates as reduced for a period of 16 years. The reasons for the rate reduction were that the franchise of Tyler Gas

had expired in 1946 and the City was about to refuse to renew it because it had been informed that another distributing company could be organized to purchase and distribute gas at substantially lower rates.

As the District Court for the Eastern District of Texas found in the *Tyler Gas Service Company and City of Tyler v. United Gas Pipe Line Company*, E. D. Texas, Civil No. 1662, affirmed 217 F. 2d 73, the principal consideration supporting the amended contract was the granting of a new franchise by the City of Tyler to Tyler Gas for a period coincident with the term of the amended contract, 16 years. This franchise was granted by the City only after United expressly agreed in writing with the City to abide the amended contract for 16 years and further agreed to sell gas to the City on the basis provided in the amended contract in the event the City exercised its reserved right against Tyler Gas to acquire its properties. Memorandum Opinion unreported, reproduced at p. 106 et seq. of Record in No. 15,034 in the United States Court of Appeals for the Fifth Circuit, *Tyler Gas Service Company et al. v. United Gas Pipe Line Company*, 217 F. 2d 73.

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The amended contract between United and Tyler Gas was duly filed with the Federal Power Commission and made effective pursuant to Section 4 of the Natural Gas Act. Sales of gas to Tyler Gas by United have been and are now being made pursuant to that amended contract and there is no other existing contract or agreement, oral or written, between Tyler Gas and United or between City of Tyler and United relating to such sales of gas.

5. By the filings which Tyler Gas and Tyler seek by this Petition to have the Commission reject, United proposes, effective June 16, 1956, substantial increases in its rates

for sales of gas to Tyler Gas for resale for both domestic and industrial use. These proposed increases are in violation of the terms of the above described contract between United and Tyler Gas and the contract between United and the City of Tyler, which contracts are valid and subsisting, and therefore binding until set aside by the Federal Power Commission by a proper order under Section 5 of the Natural Gas Act.

6. The ground upon which rejection of United's filings as to Tyler Gas is sought is that a contract between a natural gas company and a purchaser therefrom duly filed with and accepted by the Federal Power Commission pursuant to Section 4 of the Natural Gas Act is binding on the natural gas company. Therefore the Commission must reject an attempt by a natural gas company to increase rates in violation of its contract by a voluntary, unilateral filing under Section 4(d) of the Act. The Supreme Court of the United States so held in *Federal Power Commission* v. *Mobile Gas Service Corp.* and *United Gas Pipe Line Company* v. *Mobile Gas Service*

Corp., 350 U. S. 332 (1956). The Court held that "the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally," and that an increased rate schedule filed in violation of a contract is "a nullity insofar as it purport[s] to change the rate set by [the] contract . . . and that the contract rate remain[s] the only lawful rate. There can be no doubt of the authority of the Commission to reject the unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act,' § 16 . . . . ". Since the decision of the Supreme Court the Commission has exercised that authority. *In the Matter of J. M. Huber*

Corporation, Dockets G-9316 and G-9416, the Commission rejected rate filings as "attempted unilateral changes in rates established by contract [which] are ineligible for filing under Section 4(d) of the Natural Gas Act." Order issued April 13, 1956.

7. There is now pending before this Commission in Docket G-2210 the Motion of Tyler Gas Service Company, filed May 15, 1956, for an Order directing United to refund amounts it has collected from Tyler Gas for deliveries of gas for resale for other than domestic use only pursuant to Opinion and Order No. 277, *in the Matter of United Gas Pipe Line Company*, Docket G-1142 et al. Such amounts have been collected subject to refund as provided in an Order of this Commission issued January 25, 1954 in Docket G-2210 and as further provided in Paragraph (C) of the Order accompanying Opinion No. 277. There is also pending in Docket G-9547 the Petition of Tyler Gas Service Company and City of Tyler, Texas, filed October 18, 1955, for an order rejecting the increased rate filing of United Gas Pipe Line Company of September 30, 1955. That Motion and that Petition are incorporated herein by

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reference. A reading of them will disclose that they are grounded on the same basic facts and principles of law herein set out, namely, the existence of contracts between United and Tyler Gas and between United and City of Tyler, which contracts, under the rule of the *Mobile Case*, supra, cannot be changed unilaterally by United.

These basic facts are not, indeed cannot be, in issue between United and Petitioners. This is clear from United's pleadings in response to the Motion for Refund in Docket G-2210 and the Petition for Rejection in Docket

G-9547, from the public records of the Commission containing all of the contracts and agreements under which United makes sales subject to the jurisdiction of the Commission under the Natural Gas Act, and from the Findings of Fact of the United States District Court for the Eastern District of Texas, *Tyler Gas Service Company and City of Tyler* v. *United Gas Pipe Line Company*, supra, reproduced in the Motion for Refund in Docket G-2210.

8. United's defenses in its pleadings to the Motion in Docket G-2210 and the Petition in Docket G-9547 are in substance that the judgments of the United States District Court for the Eastern District of Texas and of the United States Court of Appeals for the Fifth Circuit in the above styled cases are *res judicata* on the issues Petitioners herein raise, and that the amended contract of May 29, 1946 between Tyler Gas and United was superseded by United's Conversion Tariff in Docket G-2019 and is no longer in effect. Since these are defenses of law it follows that an evidentiary hearing is no more necessary or appropriate to the determination of the

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Motion for Refund in Docket G-2210, the Petition for Rejection in Docket G-9547 or this Petition for Rejection than was such a hearing in the *Mobile Case* or in the *Huber Case, supra*, both of which were finally determined on the pleadings. Counsel for Petitioners so stated on argument before the Commission on various Motions to Dismiss Rate Filings in Docket G-9547 held on May 25, 1956, which statement counsel for United did not challenge, although he had an opportunity to do so.

If the Commission deems oral argument necessary or appropriate on these matters Petitioners renew their oral

motion to the Commission made in the course of the argument on May 25, 1956 that the Motion for Refund in Docket G-2210 and the Petition for Rejection in Docket G-9547 be consolidated for argument and further move that this Petition for Rejection be so consolidated with them. Petitioners earnestly request that these matters be set for argument and determined forthwith. They have been the subject of active controversy between Petitioners and United since July of 1953. The existence of that controversy has had and continues to have serious practical consequences to Tyler Gas, to the City of Tyler and to the consumers served by Tyler Gas. The authoritative decision of the Supreme Court in the *Mobile Case* was rendered February 27, 1956, more than three months ago. Since the issue between Petitioners and United is simply whether, on the admitted facts, the rule of the *Mobile Case* is applicable, it is submitted that there is no justification for delay.

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WHEREFORE Petitioners pray (1) that the Federal Power Commission issue an Order rejecting the rate filing of United Gas Pipe Line Company of May 15, 1956 insofar as it is proposed to be made applicable to sales of gas to Tyler Gas Service Company, (2) that, in the event the Commission deems it appropriate to set this Petition for oral argument, it consolidate this Petition for oral argument with the Motion for Refund of Petitioner Tyler Gas Service Company in Docket G-2210, filed May 15, 1956 and the Petition for Rejection of Petitioners in Docket G-9547, filed October 18, 1955, and set oral argument on or about July 6, 1956, which is the date the Answer of United Gas Pipe Line Company to this Petition will be due, and (3)

for such further relief as the Commission deems meet in the premises.

Respectfully submitted,

/s/ Bryce Rea, Jr.
Munsey Bryce Rea, Jr.
Munsey Building
1329 E Street, N. W.
Washington 4, D. C.

Counsel for
Tyler Gas Service Company
and City of Tyler, Texas

Of Counsel

Thomas B. Ramey
Citizens National Bank Building
Tyler, Texas

Troy Smith
City Attorney of Tyler, Texas
Citizens National Bank Building
Tyler, Texas

J. W. Crosland
1100 Republic National Bank Building
Dallas 1, Texas

Ramey, Calhoun, Brelsford & Hull
Citizens National Bank Building
Tyler, Texas

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UNITED STATES OF AMERICA

BEFORE THE

FEDERAL POWER COMMISSION

Docket G-10592

In the Matter of

UNITED GAS PIPE LINE COMPANY

Answer of United Gas Pipe Line Company to "Petition of Tyler Gas Service Company and City of Tyler, Texas, for Order of Federal Power Commission Rejecting Rate Filing of United Gas Pipe Line Company" Made on May 15, 1956.

Now Comes United Gas Pipe Line Company (United) and files herewith its answer to the "Petition" of Tyler Gas Service Company (Tyler Gas) and City of Tyler, Texas (Tyler) to dismiss filing of notice of change for increased rates made by United on May 15, 1956, as follows:

1.

The names and addresses of all persons upon whom it is requested that copies of any notices, motions, orders, documents, or papers relating to this motion styled "Petition" be served are as follows:

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W. W. Brown, Assistant Secretary,
United Gas Pipe Line Company,
P. O. Box 1407,
Shreveport, Louisiana.

W. O. Crain, General Counsel,
United Gas Pipe Line Company,
P. O. Box 1407,
Shreveport, Louisiana.

George D. Fiser, General Attorney,
United Gas Pipe Line Company,
P. O. Box 1407,
Shreveport, Louisiana.

Thomas Fletcher,
11th Floor Esperson Building,
Houston 2, Texas.

C. Huffman Lewis,
P. O. Box 1707,
Shreveport, Louisiana.

2.

This motion filed by Tyler Gas and Tyler is similar, if not identical, with that filed by Tyler Gas at Docket G-9547 in the matter of United Gas Pipe Line Company, referred to on the face of the instant motion. Therefore United adopts as its answer here both to Tyler Gas and to Tyler its answer to the motion filed by Tyler Gas at Docket G-9547, together with all matters referred to and

adopted by said answer of United to the motion of Tyler Gas at Docket G-9547.

3.

In addition, and particularly to that portion of the instant motion in which Tyler Gas asserts that it had some "contract" with United: United denies that it had or has any contract with Tyler. United shows that in C. A. No. 1662 styled *Tyler Gas Service Company and the City of Tyler, Texas* v. *United Gas Pipe Line Company*, in the United States District Court for the Eastern District of Texas, Tyler Division, Tyler joined Tyler Gas in seeking the injunctions more particularly described in United's answer to the motion of Tyler Gas at Docket G-9547, which

suit resulted in an adverse judgment to Tyler which was by the United States Court of Appeals for the Fifth Circuit affirmed, and which adverse judgment thereafter became final in the way and manner set out in United's answer to the motion of Tyler Gas at Docket G-9547, whereby said judgments and decisions of the United States District Court and of the United States Court of Appeals for the Fifth Circuit

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in said cause, which was numbered 15034 on the Docket of the Fifth Circuit, are res judicata upon the contentions sought to be made by Tyler in this cause, and are binding and conclusive upon it against the contentions now again sought to be here raised.

In this connection United shows that Tyler adopted and made its own all of the allegations of Tyler Gas and sought to assert the same positions and contentions asserted by Tyler Gas. In addition Tyler asserted and claimed a contract based upon a purported letter written by United. United denied it had a contract with Tyler, or that any consideration had contractually moved to United, and asserted that Tyler was not in privity with, nor a party to, the contract between United and Tyler Gas; that it was without any power, regulatory or otherwise, over United or over the contract between United and Tyler Gas; that the letter upon which Tyler based its claim did not constitute an amendment or supplement to any arrangement, contract or otherwise, between United and Tyler Gas, nor had it been approved by this Commission, and that Tyler was without any power at the law or by virtue of any expressed authority

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contained in its Charter to make any agreements or "Stipulations" respecting utility rates for gas, since such

would be in derogation of the performance by Tyler of its legislative and governmental function to fix and regulate utility rates to be charged by Tyler Gas to the citizens of Tyler, whereby Tyler was without any authority or power whatever to adopt the franchise it gave to Tyler Gas, or any provision in it, either alone or in connection with any purported letter written to it by United as a contract between Tyler and United. On this point the Trial Court held:

> "The plaintiffs contend that United was a party to a contract not only with Tyler Gas, but that its telegram of February 28, 1946, its letter of April 3, 1946, to the Commission of the City of Tyler, and its conduct throughout the period during which the City was negotiating with Tyler Gas concerning a renewal of its franchise, made out a contract as well between United and the City. While I would have difficulty spelling out all the elements of a contract between United and City, undoubtedly strong elements of estoppel may be invoked by City against United. It is undisputed that City was influenced in granting the renewal franchise to Tyler Gas by the assurances from United that it would sell to Tyler Gas for a long period of time at the 12¢ rate. But I think that the presence of City here as a plaintiff
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> does not strengthen the case against United. If it could not, by virtue of its contract with Tyler Gas, preclude its own application to the Commission for a review of its rate structure, then it could not estop itself by reason of its conduct toward the City from taking the same action." (See copy of opinion adopted in Answer in G-9547.)

Tyler's claim to "contract" was squarely presented to the Appellate Court upon a specification of error that such "contract" entitled it to injunctions to prevent "violation" of United's alleged "agreement" and "representa-

tion" as to rates (see Fn. 4, Specification, 217 F. 2d p. 77). But this holding was affirmed by the United States Court of Appeals for the Fifth Circuit, 217 F. 2d 73, et seq.

The Charter of the City of Tyler grants no express power to contract respecting utility rates. On the contrary, Section 45 of the charter of Tyler, like Article 1119, Revised Civil Statutes of Texas, provides:

> "The City of Tyler shall have the power *by ordinance* to fix and regulate the price of gas * * *" (Emphasis supplied)

Tyler cannot bind itself and its inhabitants by contract to pay a stipulated rate for gas deliveries for a fixed term of years, thereby suspending the operation of its charter, which

declares it shall have the power to fix and regulate the price of gas by ordinance. It cannot by contract surrender or put in abeyance its duty so to regulate. The Supreme Court of Texas, through its Commission of Appeals, in the *City of Uvalde* v. *Uvalde Electric & Ice Company* (1923) 250 SW 140, had before it the power and authority of a city to make a contract for rates, and whether an ordinance could qualify as such a contract. Holding that the municipal corporation was an agent of the State whose functions are strictly limited by the statutory provisions granting them, and that in the exercise of such functions the municipality is an arm of sovereignty whose "powers are strictly construed" and that such governmental functions are legal duties which must be performed by the municipality, and noting the absence of express power in the charter to make a contract, the Court concluded:

> "The grant of power by the Legislature to the city to regulate those rates *was an exclusion of the power*

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to make a contract for light rates that would suppress or suspend the expressly granted power to regulate.

"The power to regulate rates and the power to stipulate by contract for a term of ten years for rates cannot co-exist. If the city has

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the power thus to contract, then it has not the power so to regulate during the term of the contract." (Emphasis supplied.)

The Court pointed out that in the absence of express words of authority the municipality could not contract. Tyler, before the Courts, laid reliance upon *City of Texarkana* v. *Arkansas-Louisiana Gas Company* (1938) 306 U. S. 188, but that case does not assist Tyler, for there the Supreme Court expressly rested its decision upon the holding (p. 196):

"By the act to incorporate the City of Texarkana, Texas, the legislature granted a special charter which contained delegations of power to the municipality *to contract* for utilities *and* to regulate gas rates, and prohibitions against the granting of a franchise without a specific reservation of this power of future regulation." (Emphasis supplied)

The Supreme Court then went ahead to say that this express contractual power was within the provision of the *Uvalde* case, and was also within the assumption of the Supreme Court of Texas in the case of *Dallas Railway Company* v. *Geller* (1925 Texas Supreme Court) 271 S. W. 1106, which was that if the express power to contract was granted it could co-exist with the regulatory power also granted.

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Tyler lost its suit to establish a "contract" with United, and was adjudged precisely as Tyler Gas was adjudged

by the decisions both of the Trial Court and the United States Court of Appeals for the Fifth Circuit, which now bind and conclude both.

WHEREFORE, premises considered, United respectfully prays that the motion of Tyler Gas and Tyler be in all things denied.

Respectfully submitted,

UNITED GAS PIPE LINE COMPANY

By THOMAS FLETCHER
Thomas Fletcher
11th Floor Esperson Building
Houston 2, Texas.
Its Attorney of Record.

W. O. CRAIN,
General Counsel,
P. O. Box 1407,
Shreveport, Louisiana.

GEORGE D. FISER,
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Attorneys for United Gas Pipe Line Company

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STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared THOMAS FLETCHER, who being by me duly sworn, states that he is Attorney of Record for United Gas Pipe Line Company, duly authorized and empowered

for and on its behalf and in its name to execute the foregoing Answer to Petition of Tyler and Tyler Gas; that the matters and facts contained in said answer are to the best of his knowledge, information and belief, true.

THOMAS FLETCHER
Thomas Fletcher

SWORN TO AND SUBSCRIBED before me this 13th day of June, 1956.

ELIZABETH COGHLAN
Elizabeth Coghlan
Notary Public in and for
Harris County, Texas

My Commission Expires
June 1, 1957.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Claude L. Draper, Seaborn L. Digby and Frederick Stueck.

Dockets Nos. G-1142, G-2210, and G-9547

In the Matters of
UNITED GAS PIPE LINE COMPANY

Order Consolidating Proceedings for Purpose of Oral Argument and Fixing Date Thereof

(Issued June 22, 1956)

Tyler Gas Service Company (Tyler Gas), an intervener in the proceedings, on May 15, 1956, filed a motion for an order of the Commission "directing United Gas Pipe Line Company to refund to Tyler Gas Service Company all of

the increased rates and charges made effective as of December 25, 1953 in Docket No. G-2210 not heretofore refunded pursuant to paragraph (D) of the ordering portion of Opinion and Order No. 277, issued November 2, 1954, with interest at the rate of 6% per annum from date of payment until refunded, and further directing United to bear all costs incident to the making of said refund."

After reciting the history and circumstances under which Tyler Gas has purchased and now purchases natural gas from United Gas Pipe Line Company (United), Tyler Gas alleges that United's increased rate filings in Docket No. G-2210 were unilaterally made in violation of United's existing contract with Tyler Gas, and that the rule of *Federal Power Commission* v. *Mobile Gas Service Corporation*, 350 U.S. 332, is applicable here. Tyler Gas states that under that rule United's increased rates are a nullity insofar as they purport to change the rates established in the contract between Tyler Gas and United.

It appears from the May 15, 1956, motion that Tyler Gas seeks to recover the difference between the rates payable to United under the applicable rate schedules for gas delivered to Tyler Gas for resale for other than industrial use only as set forth in United's conversion tariff filed in 1952 and which were effective on December 24, 1953, and the rates collected by United under the applicable rates set forth in Rate Schedule DG-C of United's FPC Gas Tariff, First Revised Volume No. 1. The latter rates were filed pursuant to the order accompanying Opinion No. 277 in the proceedings in Docket Nos. G-1142 and G-2210. They were prescribed and filed in lieu of rates proposed by United in Docket No. G-2210, which became effective, under bond and subject to refund, on December 25, 1953. Tyler Gas seeks recovery for payments made

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by it for natural gas received from United in the period commencing December 25, 1953 and continuing

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through January 1956, which payments, as noted, were in excess of rates in effect on December 24, 1953. It appears that for gas received in February 1956 and thereafter Tyler Gas has tendered payment on the basis of its contract with United and has demanded refund, with interest at 6% per annum, of all amounts paid in excess of amounts said to be due under the contract. Tyler Gas states that United has returned such tenders, and has requested immediate payment on the basis of rate on file with the Commission, that is, those previously mentioned rates filed pursuant to the order accompanying Opinion No. 277, and on the basis of billings pursuant to rates proposed by United in Docket No. G-9547, in which proceeding United filed a motion on March 20, 1956, to make the rates effective.

United, on May 23, 1956, filed its answer to the May 15, 1956 motion of Tyler Gas. In support of its answer, United avers that the facts and circumstances underlying the sale of natural gas by United to Tyler Gas require the latter to pay the filed and legal rate. United states that the contract relied upon by Tyler Gas has been adjudicated to have been superseded and replaced by the conversion tariff and the applicable rate schedules contained therein and superseding schedules now on file with the Commission. It points to the decisions in *Tyler Gas Service Company* v. *United Gas Pipe Line*, C. A. No. 1622, United States District Court for the Eastern District of Texas, Tyler Division, decided December 29, 1953, and *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, 217 F. 2d 73, wherein the United States Court of Appeals for the Fifth Circuit affirmed the District Court's

judgment. It appears from the pleadings filed with the Commission that the litigation involved a suit brought by Tyler Gas and the City of Tyler, Texas, also an intervener in these proceedings before the Commission, to enjoin United from making effective the rates suspended in Docket No. G-2210. United contends that these judgments are final and such decisions are obligatory upon Tyler Gas and United.

Further, United avers that the *Mobile* decision does not assist Tyler Gas. United concludes with a request that the Commission sustain the answer of United; that the motion of Tyler Gas be in all things denied; that Tyler Gas be forthwith order and directed to pay the full amount of the billings of United in accordance with the filed rates until such time as such rates may be superseded and replaced by rates filed with the Commission as required and permitted by the Natural Gas Act.

Tyler Gas, in its May 15, 1956 motion also alludes to the fact that in its petition to intervene in Docket No. G-2210 it "challenged the legality of United's proposed rate increases on the ground that they were in violation of the obligations of United under contracts among it, Tyler Gas, and the City of Tyler, Texas."

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As noted previously, the proceedings in Docket Nos. G-1142 and G-2210 resulted in the Commission's Opinion No. 277. By the order accompanying the aforesaid Opinion we provided that the rate investigation proceeding in Docket No. G-1142 remain open insofar as it related to the rates and charges of United applicable to Tyler Gas. Further, we provided in such order that the proceeding in Docket No. G-2210 remain open, because of the appeal of Tyler Gas then pending in the United States Court of Appeals for the Fifth Circuit, for a determination of the

issues raised by the petitions to intervene of Tyler Gas and the City of Tyler, Texas.

On September 30, 1955, United filed other increased rates, including increased rates and charges applicable to the sales of gas to Tyler Gas. These increased rates and charges were suspended until April 1, 1956, by order of the Commission issued in Docket No. G-9547, except in so far as they related to the sale of gas for resale for industrial use only. Tyler Gas, on October 21, 1955, filed a motion for an order of the Commission rejecting United's increased rates in Docket No. G-9547 relating to sales of natural gas to Tyler Gas. In support of the motion, Tyler Gas again relies upon the *Mobile* case and upon the decision of the United States Supreme Court in *Federal Power Commisison* v. *Sierra Pacific Power Company*, 350 U.S. 348.

United, on October 26, 1955, filed a motion to dismiss and answer to Tyler Gas' motion in Docket No. G-9547.

It appears abundantly clear from the various pleadings of Tyler Gas and United in the proceedings in Docket Nos. G-1142, G-2210, and G-9547 that the underlying facts and circumstances are largely without dispute. Tyler Gas and United differ only as to the legal significance to be placed upon such facts and circumstances. The pleadings referred to raise question which are not completely resolved.

Moreover, inasmuch as the pleadings of Tyler Gas and United raise substantially the same question in each of these proceedings, it is appropriate that the matters involved and the issues presented by such pleadings be resolved at the same time.

The Commission *finds:*

It is necessary and appropriate in carrying out the provisions of the Natural Gas Act and for the proper adminis-

tration thereof that oral argument be had concerning the matters involved and the issues presented by the May 15, 1956, motion of Tyler Gas and the answer of United in the proceedings in Docket Nos. G-1142 and G-2210, the petitions to intervene of Tyler Gas and the City of Tyler, Texas, in such proceedings, and by the October 21, 1955 motion of Tyler Gas and the answer of United in the proceeding in Docket No. G-9547; and that the proceeding in Docket No. G-9547 be consolidated with the proceedings in Docket Nos. G-1142 and G-2210 solely for purpose of oral argument upon the pleadings described above.

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The Commission *orders:*

(A) The proceeding in Docket No. G-9547 be and it is hereby consolidated with the proceedings in Docket No. G-1142 and G-2210 solely for the purpose of the oral argument provided for in Paragraph (B) hereof.

(B) Oral argument be had before the Commission on July 13, 1956, at 10:00 a.m. (EDST), in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D.C., concerning only the matters involved and the issues presented by the pleadings of Tyler Gas Service Company, City of Tyler, Texas, and United Gas Pipe Line Company in the proceedings in Docket Nos. G-1142, G-2210, and G-9547.

(C) Parties to the proceedings who intend to participate in the oral argument shall notify the Secretary of the Commission on or before July 3, 1956, of such intention and the time requested for presentation of their arguments.

By the Commission.

LEON M. FUQUAY,
Leon M. Fuquay,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck and William R. Connole.

Docket Nos. G-1142, G-2210, G-9547, and G-10592

In the Matters of
UNITED GAS PIPE LINE COMPANY

Order Further Consolidating Proceedings for Purpose of Oral Argument Only and Supplementing Order Issued June 22, 1956

(Issued June 28, 1956)

By order issued June 22, 1956, the Commission consolidated the proceeding in Docket No. G-9547 with the proceedings in Docket Nos. G-1142 and G-2210 for purpose of oral argument upon the matters involved in and the issues presented by (1) the May 15, 1956 motion of Tyler Gas Service Company (Tyler Gas) and the answer of United Gas Pipe Line Company (United) in Docket Nos. G-1142 and G-2210; (2) the petitions to intervene of Tyler Gas and the City of Tyler, Texas, in such proceedings; and (3) the motion of Tyler Gas and the answer of United in Docket No. G-9547. We fixed July 13, 1956, as the date of oral argument thereon.

United, on May 15, 1956, filed increased rates, including increased rates and charges applicable to the sales of gas to Tyler Gas. These increased rates and charges were suspended until November 16, 1956, by order of the Commission issued June 15, 1956, in Docket No. G-10592.

Tyler Gas and the City of Tyler, Texas, on June 15, 1956, filed a joint petition in Docket No. G-10592 for an order of the Commission rejecting the May 15, 1956 filing of United insofar as it applied to sales of gas to Tyler Gas.

Petitioners state, and the petition so shows, that the joint petition in Docket No. G-10592 and the other pleadings hereinabove referred to are grounded upon the same basic facts and principles of law, namely, the rule of the United States Supreme Court in *Federal Power Commission* v. *Mobile Gas Service Corporation*, 350 U.S. 332, and *Federal Power Commission* v. *Sierra Pacific Power Company*, 350 U.S. 348. They request that these matters be consolidated and set for oral argument.

In its answer in Docket No. G-10592, United adopted its answer to the motion of Tyler Gas in Docket No. G-9547 and, in addition, denied that it had or has any contract with the City of Tyler, Texas. United again points to the decisions in its favor in *Tyler Gas Service Company* v. *United Gas*

Pipe Line Company, C.A. No. 1622, United States District Court for the Eastern District of Texas, Tyler Division, decided December 29, 1953, affirmed by the United States Court of Appeals for the Fifth Circuit, 217 F. 2d 73, as being final judgments and obligatory upon Tyler Gas, City of Tyler, Texas, and United.

The joint petition and the answer of United in Docket No. G-10592 raised substantially the same question posed in the proceedings in Docket Nos. G-1142, G-2210, and G-9547, and it appears appropriate that the matters involved and the issues presented by such pleadings be resolved at the same time.

The Commission *finds:*

It is necessary and appropriate in carrying out the provisions of the Natural Gas Act and for the proper administration thereof that oral argument be had concerning the matters involved and the issues presented by the joint petition filed on June 15, 1956 by Tyler Gas and the City of Tyler, Texas, in the proceeding in Docket No. G-10592; and that the proceeding in Docket No. G-10592 be consolidated with the proceedings in Docket Nos. G-1142, G-2210, and G-9547 solely for purpose of oral argument upon the pleadings described above.

The Commission *orders:*

(A) The proceeding in Docket No. G-10592 be and it is hereby consolidated with the proceedings in Docket Nos. G-1142, G-2210, and G-9547, solely for the purpose of the oral argument provided in Paragraph (B) hereof.

(B) The order of the Commission issued June 22, 1956, in the proceedings in Docket Nos. G-1142, G-2210, and G-9547, be and it is hereby supplemented to provide that the oral argument fixed to be had on July 13, 1956, also shall concern the matters involved in and and the issues presented by the joint petition filed June 15, 1956, in Docket No. G-10592 by Tyler Gas Service Company and the City of Tyler, Texas; and by the answer of United Gas Pipe Line Company.

By the Commission.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

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UNITED STATES OF AMERICA

BEFORE

FEDERAL POWER COMMISSION

Docket No. G-1142, Docket No. G-2210, Docket No. G-9547.

In the Matter of
UNITED GAS PIPE LINE COMPANY

Motion of United Gas Pipe Line Company to Amend Its Answers Filed at Docket Nos. G-1142, G-2210, and G-9547, to the Motion of Tyler Gas Service Company to Reject and Dismiss Filing of Notice of Change by Increase in Rates in Said Dockets

NOW COMES United Gas Pipe Line Company (United) and moves the Commission for leave to amend its answers to the motions of Tyler Gas Service Company (Tyler Gas) to reject and dismiss rate filings in said dockets by adding Paragraph 4A to Section II of United's answer filed on or about 23 May, 1956, in Dockets G-1142 and G-2210, and for grounds shows:

The answer at Dockets G-1142 and G-2210 adopts by reference as an integral part thereof the answer filed at Docket G-9547. In the answer at Docket G-9547, United attached as Exhibit "A" the opinion, findings, and decision of the United States District Court for the Eastern

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District of Texas in the case of *Tyler Gas Service Company and City of Tyler* v. *United Gas Pipe Line Company*, C. A. 1662; and as Exhibit "B" the order and judgment of said court, and as Exhibit "C" the order and judgment of the United States Court of Appeals for the 5th Circuit entered pursuant to its opinion and decision reported at 217 F. 2d p. 73, likewise adopted by reference.

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In the answer at Dockets G-1142 and G-2210, and in Section II thereof, United demonstrated by reference to the contentions, briefs, and decisions in the two court proceedings that such proceedings were *res adjudicata* upon the contentions of Tyler Gas, and also the City of Tyler, which joined in a similar motion in Docket G-10592 in The Matter of United Gas Pipe Line Company.

Upon consideration of the several motions to dismiss and United's answers thereto, and particularly in the light of the specifications of error urged in the United States Court of Appeals for the 5th Circuit; and summarized by that court on page 217 F. 2d 76, and Footnote No. 4, it is entirely clear that the pleadings of the respective parties in said suit should be a part of the answers to said motions for the consideration of

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this Commission for such pleadings show more conclusively than United's succinct condensation of them that such pleadings raised for judicial determination every claim and contention which Tyler Gas in its intervention at G-2210 and by these several motions, joined by the City of Tyler in the motion at Docket G-10592, now seeks to raise and assert. Conclusively, too, such pleadings show that the scope and intendment of the pleadings in said suit are even more inclusive and wider in range than the scope of the so-called petition to intervene at Docket G-2210, albeit inclusive of the issues of such petition to intervene to which reference is made by this Commission in its Opinion 277 holding open as to Tyler Gas Dockets G-1142 (Section 5a) proceeding, and Docket G-2210 (Section 4e) hearing ordered by the Commission, pending the determination upon the appeal of Tyler Gas, and the City of Tyler then pending before the United States Court of Appeals for the 5th Circuit.

WHEREFORE, PREMISES CONSIDERED, United prays permission that Section II of its answer at Dockets G-1142 and G-2210 to the motion of Tyler Gas be amended

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by adding thereto Paragraph 4A, which paragraph is attached to this motion.

UNITED GAS PIPE LINE COMPANY
By s/ THOMAS FLETCHER
Thomas Fletcher

Counsel for United Gas Pipe Line Company:

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THE STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared THOMAS FLETCHER, who being by me first duly sworn deposes and says upon his oath:

That he is attorney of record for United Gas Pipe Line Company in the above captioned matters and is duly authorized and empowered to execute the foregoing motion, and amend for and on behalf of, and in the name of, United

Gas Pipe Line Company, and that the facts set forth in this motion and in the amendatory paragraph II 4A are true and correct to the best of his knowledge and belief.

s/ THOMAS FLETCHER
Thomas Fletcher

SWORN TO AND SUBSCRIBED BEFORE ME the 29th day of June, 1956.

s/ ANNIE-VIEVE DETHLEFS
Annie-Vieve Dethlefs

Notary Public in and for Harris County, Texas

My commission expires
June 1, 1957
(SEAL)

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Consolidated Dockets
Nos. G-1142, G-2210, and G-9547

In the Matter of:

UNITED GAS PIPE LINE COMPANY

Amendment of United Gas Pipe Line Company by Addition of Paragraph II 4 A to Its Answer Filed at Dockets G-1142 and G-2210 to "Motion of Tyler Gas Service Company for Order Directing Refund"

II

Paragraph 4A:

The breadth and conclusive effect of the decisions by such courts, together with proof that the contentions of

the respective parties made by the pleadings is inclusive and even broader than the issue raised by the intervention of Tyler Gas in Docket G-2210, is demonstrated by the summary made by the Appellate Court at page 76 of 217 F. 2d, based on the eight specifications of error quoted in footnote 4 of that opinion. The specifications of error taken with the statement of the Appellate Court and examined in the light of the respective pleadings leaves no doubt that Tyler Gas and

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the City of Tyler asserted and contended that the so-called contract between Tyler Gas and United was, rate-wise, in every aspect, both of law and of fact, superior to, above, and beyond the reach, negotiation, and control of this Commission and binding upon this Commission and United so that the rights and alleged agreements therein contained were asserted to be outside the scope of regulation and untouchable as to change or modification by the Commission. Certified copies of Plaintiff's bill of complaint (being attached hereto as Exhibit "I", and certified copy of motions to dismiss and answer being attached as Exhibit "J",) and United's motions to dismiss for want of jurisdiction and for want of equity and answer: show that the issue was joined upon the very matters and issues which Tyler Gas now seeks to raise and assert to this Commission.

WHEREFORE, United says that the judgments and decisions of the United States District Court for the Eastern District of Texas, and the United States Court of Appeals for the 5th Circuit are *res adjudicata* of each and every issue now undertaken to be raised in the

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several motions filed in the consolidated dockets above listed, as well as in the motion filed at Docket G-10592,

and of every issue raised or which could have been raised in the petition to intervene at Docket G-2210. By the law of Texas where such litigation was filed and determined, a judgment disposes of all issues which were actually raised, or which might have been raised. By such litigation Tyler Gas and the City of Tyler are bound, concluded, and estopped now to assert that the claimed contract exists as such unchanged and unsuperceded, or that there is any contractural right or rights, such as claimed, still in valid existence above and *superior to the filings* before, orders and opinions of, this Commission beginning with Docket G-2019 and since. Such judicial decisions, particularly when read in the light of Opinion 277 by this Commission, make plain that the contract has become superceded and modified. Further, they make plain that Tyler Gas since the filing of the conversion tariff has been governed as to the terms and conditions of service by the converted contract per the statement filed pursuant to Section 154.85 of the Regulations of the Commission, and as to rates, by the applicable

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and superceding rate schedules filed by United in accordance with the Commission's regulations. Opinion 277 shows clearly that Tyler so consented and agreed reserving only the effect of its appeal to the 5th Circuit then pending. That decision does not make against but rather cements and renders obligatory submission of Tyler Gas to the ordered result of Opinion 277.

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Exhibit I

(Filed Dec. 8, 1953)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 1662

TYLER GAS SERVICE COMPANY, a Texas Corporation, and THE CITY OF TYLER, TEXAS, a Municipal Corporation,
Plaintiffs,

v.

UNITED GAS PIPE LINE COMPANY, a Delaware Corporation,
Defendant.

COMPLAINT FOR INJUNCTION

To The Honorable Judge of Said United States District Court:

Come now TYLER GAS SERVICE COMPANY, a private corporation, and CITY OF TYLER, TEXAS, a municipal corporation, hereinafter called Plaintiffs, complaining of UNITED GAS PIPE LINE COMPANY, a private corporation, hereinafter called Defendant, and respectfully show to the Court:

I.

The Plaintiff, Tyler Gas Service Company (hereinafter called Tyler Gas), is a private corporation, duly incorporated and existing under and by virtue of the laws of the State of Texas, having its principal office and place of doing business in the City of Tyler, County of Smith, State of Texas. The Plaintiff, City of Tyler, Texas, is a municipal corporation, duly created and existing under and by virtue of the laws of the State of Texas, having a Charter duly

adopted pursuant to the Statutes of the State of Texas, Articles 1165, et seq., relating to Home Rule Cities, being situated in the County of

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Smith, State of Texas. The Defendant, United Gas Pipe Line Company (hereinafter called United) is a private corporation, duly incorporated under and by virtue of the laws of the State of Delaware, and being duly licensed to do business within the State of Texas, and is engaged in doing business within the Eastern District of Texas and the Tyler Division thereof. The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

II.

A. That the Plaintiff, Tyler Gas, is the owner and operator of a system for the local distribution and sale of gas to industrial, commercial and domestic consumers within the City of Tyler and its immediate environs. The Defendant, United, is engaged in the business of gathering, transporting and selling gas for resale to distributors thereof for public consumption, and owns and operates a system for such purpose within the Eastern District of Texas and the Tyler Division thereof, and elsewhere;

B. That all of the gas which Tyler Gas distributes and sells to its consumers is acquired and purchased from United and same is delivered to Tyler Gas at a metering station where its distribution system connects with the pipe line of United at or near the city limits of the City of Tyler. Under date of November 22, 1940, a written contract was duly made and entered into between United, as Seller, and Tyler Gas, as Buyer, wherein it is stipulated and agreed as follows:

"Subject to the terms and conditions hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for (a) all gas necessary to meet Buyer's requirements of gas for resale and distribution through its said distribution system and any extentions thereof, (b) all gas consumed by Buyer in connection with

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the operation of said distribution system and facilities, and (c) all gas lost and unaccounted for after delivery to Buyer hereunder. (Section I.)

"The gas to be sold and delivered by Seller to Buyer under this agreement shall be delivered to Buyer at the metering station where Buyer's distribution system connects to the pipe line of Seller, said point of delivery being at or near the city limits of the City of Tyler, Texas." (Section II.)

C. According to its provisions, the duration of said contract extended over a period of twenty-one years, eight months and twenty days from the date thereof. Said contract contains the following express stipulation:

"This agreement shall be for a term beginning November 5, 1940, and ending July 25, 1962." (Section VI.)

D. It is further stipulated in said contract that the price which should be paid by Tyler Gas to United for the gas delivered and sold thereunder and which was thereafter resold by Tyler Gas to domestic consumers, as well as for unbilled and unaccounted for gas, should be twenty-two and one half cents per thousand cubic feet, and for gas thereafter resold to industrial consumers a sum equivalent to eighty per cent of the proceeds received by Tyler Gas there-

for, but in no event less than sixteen cents per thousand cubic feet. (Section VII.) That by amendatory agreement duly executed in writing by Tyler Gas and United under date of April 5, 1943, the provisions in the aforesaid contract relating to the price to be paid for the gas distributed and sold thereunder were revised so that from the effective date of such amendatory agreement, to-wit, April 10, 1943, the price of gas resold for domestic consumption, as well as unbilled and unaccounted for gas, was reduced from twenty-two and one-half cents per thousand cubic feet to nineteen cents per thousand cubic feet.

III.

A. That within a few years after the aforesaid contract between Tyler Gas and United was entered into, and to-wit, on the 6th day of October, 1945, the term of the Franchise theretofore held by Tyler Gas expired. Prior to such expiration, to-wit, on August 3, 1945, Tyler Gas duly made application to the governing body of the City of Tyler, the City Commission of said city, for a new Franchise to serve the gas consuming public of such city. In conjunction with such application Tyler Gas proposed to make a material reduction in the rates for gas below that it had theretofore charged to its customers in the City of Tyler. Before said application was accorded final considerat[illegible]on third reading as required by the Charter of the Ci[illegible] of Tyler, the same was strenuously and vigorously opposed by members of the City Commission of the City of Tyler. Such opposition was predicated principally on the ground that the rates proposed were excessive under the existing facts and circumstances.

B. The opposition to the granting of a new Franchise to Tyler Gas was generated and strongly supported by a large

group of prominent citizens and consumers of gas in the City of Tyler, of whom Mr. R. W. Fair was the recognized leader. Not only did they urgently and repeatedly protest to the City Commission of the City of Tyler the granting of such new Franchise to Tyler Gas on the ground that the rates offered were not sufficiently low, but said citizens openly supported the application of another group who sought a Franchise from the City of Tyler for the purpose of distributing and selling gas therein. While said application for a new Franchise in behalf of Tyler Gas was pending before the City Commission another gas distributing company, which was reputed to own or control an abundant supply of gas and an adequate pipe line system, all wholly situated within the State of Texas, and not far distant from the City of Tyler,

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had filed an application with the City Commission of the City of Tyler for a Franchise. In connection therewith said applicant proposed a schedule of rates for the sale of gas to consumers in Tyler which was materially less than the schedule of rates which Tyler Gas had proposed in conjunction with its application for a new Franchise.

C. That by virtue of recent discoveries of gas in enormous quantities in several areas in East Texas, which were in close proximity to the City of Tyler, the known available supply of gas in such vicinity had increased tremendously during the period immediately preceding the filing of the application by Tyler Gas for a new Franchise. As a consequence, the market price of gas in said area had greatly declined, of which fact the City Commission of the City of Tyler, and its citizens generally, were cognizant, and, therefore, they were demanding that the gas consuming public in the City of Tyler be accorded the benefit of such reduction in the price of gas.

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D. Recognizing this situation and believing that it would be impossible to obtain the grant of a new Franchise by the governing body of the City of Tyler unless in consideration thereof the Franchise holder should agree to offer a very substantial reduction in gas rates to be charged gas consumers in the City of Tyler, the officials of Tyler Gas discussed the matter thoroughly with the officials of United and impressed upon the latter that Tyler Gas would be unable to offer lower rates for gas in the City of Tyler, and thereby would be deprived of its Franchise to operate therein, unless United would agree to sell gas to Tyler Gas at prices substantially less than those which had theretofore obtained. Being strongly desirous of retaining the City of Tyler, and the gas consuming public therein, as an outlet for the gas which it distributed and sold, and as an inducement to maintaining the business of providing the gas

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which was distributed by Tyler Gas, United offered to reduce the price of gas lower than that which it had theretofore charged Tyler Gas under the aforesaid contract, upon condition that Mr. R. W. Fair and his associates would withdraw their opposition to the application of Tyler Gas for a new Franchise and that a new Franchise would be approved and granted by the City Commission of the City of Tyler to Tyler Gas.

E. When the aforesaid proposal of United was communicated to Mr. R. W. Fair and his associates they made a counter proposal to United, as is evidenced by a letter signed by Mr. R. W. Fair dated February 28, 1946, addressed to M. W. Ransom, Manager, Union Production Company, Tyler, Texas, a photostatic copy of which is hereto attached marked "Exhibit A," and made a part hereof. As is reflected thereby, it was proposed that Mr. Fair and his associates would withdraw their support of

the application of another gas company for a Franchise from the City of Tyler, subject to the agreement on the part of the United and Tyler Gase, among other things, that: (1) United would sell and deliver to Tyler Gas, for domestic and commercial purposes, gas at the rate of twelve cents per thousand cubic feet, instead of fourteen cents, as had been previously offered, and that Tyler Gas, in turn, would give its customers the benefit of such reduction; (2) and a rate for industrial purposes equal to eighty per cent of the proceeds of the sale thereof on a reduced graduated scale, but not less than seven and two-tenths cents per one thousand cubic feet; (3) in the event the City of Tyler should exercise the privilege contained in the proposed Franchise to Tyler Gas, to acquire the properties of Tyler Gas, United would sell gas to the City of Tyler, or its assigns, at the aforesaid rates; and (4) that such proposed rates should be made effective immediately after the Franchise applied for by Tyler Gas was granted, and said rates should remain in effect

as *maximum* rate for a period of sixteen years, subject to be increased only to the extent of increases in subsequent taxes. The aforesaid proposal by R. W. Fair and associates was duly communicated to the authorized officials of United and same was duly accepted by United as evidenced by telegram from R. H. Hargrove, Vice President and General Manager of United Gas Pipe Line Company, dated February 28, 1946, addressed to Tom Ramey, attorney for Tyler Gas Service Company, a photostatic copy of which is hereto attached, marked "Exhibit B" and made a part hereof, which is in words and figures as follows:

"I am familiar with conditions of letter from R. W. Fair to M. W. Ransom dated February twenty eight and on behalf of this company hereby agree to comply

with the conditions set forth in said letter insofar as they relate to this company."

IV.

A. That the consent and agreement of United to the aforesaid proposal of R. W. Fair and associates, as reflected by Exhibit A and Exhibit B above referred to, was immediately communicated to R. W. Fair and associates and to the Commission of the City of Tyler, as well as to the officials of Tyler Gas. In reliance thereon Tyler Gas again revised downward the schedule of rates which it proposed to the City Commission to charge to consumers of gas in the City of Tyler in the event its application for a new Franchise should be granted. Said proposed reduced schedule of rates contained proportionate reductions in charges to gas consumers commensurate with the aforesaid reduction in prices which United had thus agreed to put into effect for gas sold by it to Tyler Gas. A copy of said revised schedule of rates which Tyler Gas thus proposed and submitted to the Commission of the City of Tyler is attached hereto, marked "Exhibit C" and made a part hereof.

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B. In further reliance upon the aforesaid commitment and agreement of United, that reduced prices which it thereby agreed to make for gas sold by it to Tyler Gas would be the *maximum* price which it would charge therefor during a period of sixteen years, subject only to such increases as might be occasioned by subsequent increases in gas taxes, Tyler Gas, in turn, proposed to the City of Tyler that the revised schedule of reduced rates which it thereupon submitted to the Commission of the City of Tyler would not be increased during the life of the new Franchise, except to compensate for such tax increases. This proposal on the part of Tyler Gas is evidenced by a

written communication addressed to the Commission of the City of Tyler under date of March 1, 1946, photostatic copy of which is hereto attached, marked "Exhibit D" and made a part hereof.

C. In further reliance upon the aforesaid commitment and agreement by United, R. W. Fair and his associates discontinued opposition to the application of Tyler Gas for a new Franchise from the City of Tyler and withdrew their support of the pending application of the other parties, heretofore referred to, for a Franchise to sell and distribute gas in the City of Tyler. In consequence thereof, at its next meeting held on March 1, 1946, the City Commission of the City of Tyler approved and passed, on second reading, the application of Tyler Gas for a new Franchise extending over a term of sixteen years. At the same meeting the Commission refused to take action on the pending application of such other parties.

V.

A. As a condition to final approval and enactment of an Ordinance granting a new Franchise, as had been proposed by Tyler Gas, the City Commission demanded that United confirm its commitment herebefore referred to in the form of a direct written obligation to the City of Tyler. In compliance with

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such demand, by written communication dated April 3, 1946, duly signed by R. H. Hargrove, its vice president, United executed and delivered an agreement addressed to the Commission of the City of Tyler whereby it expressly agreed that if and when the new Franchise proposed by Tyler Gas became effective that (1) United would sell gas to Tyler Gas for domestic and commercial consumption at twelve cents per one thousand cubic feet and for industrial consumption on a participating graduating scale wherein

United would receive not less than seven and two-tenths cents per one thousand cubic feet therefor; (2) in the event the City of Tyler should subsequently exercise the privilege contained in the Franchise, to acquire the properties owned by Tyler Gas, United would sell gas to the City of Tyler, or its assigns, at the aforesaid rates; and (3) said rates would constitute the *maximum* rates which United would charge for such gas for the period of sixteen years, subject only to such increases as might be occasioned by subsequent increases in certain gas taxes. A photostatic copy of said commitment and agreement by United is attached hereto, marked "Exhibit E" and made a part hereof.

B. The aforesaid agreement on the part of United was submitted to the City Commission of the City of Tyler at its next regular meeting held on April 5, 1946, and same was duly accepted as a contract between United and the City of Tyler, as is evidenced by a Resolution to such effect which was then and there duly introduced and passed by the City Commission. Thereupon a further motion was duly made and unanimously carried by said City Commission that the Ordinance granting the application of Tyler Gas for said proposed new Franchise be adopted on third and final reading. A certified copy of an excerpt of the Minutes of the aforesaid meeting of the City Commission of the City of Tyler relating to said matters, marked "Exhibit F" is hereby attached and made a part hereof.

VI.

A. The Ordinance of the City of Tyler, above referred to, granting said new Franchise to Tyler Gas, provides that same shall extend for a period of sixteen years from and after the execution thereof by the City Commission and its acceptance by Tyler Gas. (Section I.)

B. Said Franchise further provides, among other provisions, that "The rates which shall be charged by the company for gas distributed and sold in the City of Tyler shall be fixed by the City pursuant to due and proper order of the City Commission." (Section VI.) In such connection, however, said Franchise contains the further express stipulation:

> "It is expressly stipulated that at no time while this Franchise is in effect shall the rates charged by the company exceed the rates prescribed in the schedule of rates proposed by the company and submitted herewith save and except in the event the cost of gas hereafter by virtue of subsequent increases in existing hereafter by virtue of subseguent increases in existing gross production taxes, severance taxes, pipe line taxes or other taxes, except ad valorem and income taxes, then such rates shall be increased by the Commission in an amount sufficient to defray such increased cost of gas by virtue of such increased taxes." (Section VI).

Appended to said Ordinance granting such Franchise, and made a part thereof, is the revised schedule of gas rates which had theretofore been submitted to the Commission of the City of Tyler by Tyler Gas, as hereinbefore stated, as is reflected in Exhibit C hereto attached.

C. It is expressly stipulated in said Ordinance that said Franchise should not become effective unless and until a majority of the qualified voters of the City of Tyler

should vote in favor of granting same at an election held for such purpose. (Section IX.) Accordingly, said Ordinance further provided that such an election should be held on May 14, 1946, and stipulated the method and manner in which such election should be conducted. (Sec-

tions XIX, XXI, XXII, XXIII, XXIV, XXV and XXVI.) Said election was duly held in accordance with the provisions of said Ordinance and pursuant to law, and a majority of the votes cast in said election were in favor of said Ordinance. As reflected by Resolution duly passed and approved by the Commission of the City of Tyler under date of May 21, 1946, the returns of said election were duly canvassed and approved and said Ordinance granting said Franchise to Tyler Gas, upon the terms and conditions therein stated, was declared to be finally adopted as a contract between the City of Tyler and Tyler Gas, subject to acceptance thereof by Tyler Gas. Thereafter Tyler Gas executed and duly filed with the Commission of the City of Tyler its written acceptance of said Franchise, as provided in said Ordinance, and pursuant thereto, by Resolution duly passed and approved by the Commission of the City Tyler on June 7, 1946, said Ordinance and Franchise were declared to be in full force and effect. On the same date the Commission of the City of Tyler duly enacted a further Ordinance authorizing Tyler Gas, from and after June 1, 1946, to make charges and collect from consumers of gas in the City of Tyler according to the schedule of rates which had theretofore been proposed and submitted by Tyler Gas in conjunction with said Franchise as finally adopted, which schedule of rates is reflected in Exhibit C hereto attached, as hereinabove referred to.

VII.

In confirmation of its agreement to and with Tyler Gas, as well as its commitment and agreement with the City of Tyler, as hereinbefore set forth, United entered into a further

amendatory agreement in writing with Tyler Gas, dated May 29, 1946, whereby Section VII of the existing con-

tract between said parties, dated November 22, 1940, was further amended. By virtue of such amendment it was agreed that effective from and after May 10, 1946, United would charge Tyler Gas for all gas sold and delivered as follows: (1) for gas sold for resale to domestic consumers as well as all unbilled and unaccounted for gas, twelve cents per thousand cubic feet; and (2) for gas sold for resale to industrial consumers, eighty per cent of the proceeds of such resale on a graduated scale according to volume of sales, but not less than twelve cents per thousand cubic feet, unless United should agree in writing to a lesser charge. By letter dated May 21, 1946, addressed to Tyler Gas, United did agree that the minimum price which it would receive for such industrial gas, on the basis of said percentage of the proceeds of the resale thereof, would be reduced below the aforesaid minimum rate, and did thereby consent to charge for industrial gas eighty percent of the proceeds of the gas sold for industrial purposes, as stipulated in the Franchise rate agreed upon by Tyler Gas and the City of Tyler, as is reflected in Exhibit C hereto attached, but in no event less than seven and two-tenths cents per thousand cubic feet.

VIII.

A. The aforesaid amendatory agreement entered into between United and Tyler Gas, and the revised schedule of rates stipulated therein, were thereafter duly filed by United with the Federal Power Commission, and request was then made that said revised rates be permitted to take effect as of date of May 1, 1946. Pursuant thereto, by Order duly made and entered, the Federal Power Commission accepted said revised schedule of rates for filing and allowed same to take effect as of the date so requested by United.

B. The aforesaid revised schedule of rates which

United thus agreed to charge Tyler Gas, and the corresponding schedul of rates which Tyler Gas agreed to charge the consumers of gas in the City of Tyler, pursuant to the provisions of the Franchise and Ordinance relating thereto, were put into effect on the respective effective dates thereof, as hereinbefore specified. Said rates were thereafter duly recognized and observed as the authorized, valid and lawful rates to be charged and paid for by said respective parties for such gas, and payments therefor were made accordingly.

IX.

That by virtue of an enactment of the Fifty-second Legislature of the State of Texas, designated House Bill 285, effective September 1, 1951, a gathering tax amounting to forty-five one hundredths of one cent per thousand cubic feet was imposed on all gas produced in the State of Texas and delivered for sale. Therefore, in accordance with the provisions of the aforesaid contract, United increased the charge made to Tyler Gas for gas sold and delivered subsequent to September 1, 1951, in the sum of forty-five one hundredths of one cent per thousand cubic feet—same being the amount of such gathering tax. Thereafter, by Ordinance effective February 1, 1952, duly passed by the Commission of the City of Tyler, authority was granted to Tyler Gas to increase the rates it had theretofore charged consumers of gas in the City of Tyler to the extent of forty-five one hundredths of one cent per thousand cubic feet. With the sole addition of such increase to the extent of such gathering tax, the rates stipulated in said Franchise and Ordinance passed pursuant thereto, as hereinbefore set forth, have remained the rates which Tyler Gas has charged consumers of gas in the City of Tyler continuously since the effective date of such Frachise and Ordinance, and said rates are still in effect.

X.

On or about July 1, 1952, United filed with the Federal Power Commission a so-called "Conversion Rate" schedule of rates designating to be thereafter charged for gas which it sold to Tyler Gas. According to such schedule United proposed to charge eleven and two-tenths cents per thousand cubic feet for all gas sold to Tyler Gas for both domestic and industrial consumption, except for gas consumed by one large-volume industrial customer—McMurrey Refining Company—for which it proposed to charge seven and five-tenths cents per thousand cubic feet. The aforesaid alteration in the existing rate schedule was opposed and protested by Tyler Gas on the ground that same constituted a violation of the existing contract between United and Tyler Gas. Nevertheless, such revised rates were put into effect as of August 3, 1952, and charges were then made according thereto by United for gas sold and delivered to Tyler Gas from and after such date. Although said alteration in rates stipulated only a small decrease in the domestic rate and a small increase in the industrial rate which had theretofore been charged Tyler Gas by United, and although such alteration did not materially affect the total consideration for gas sold by United to Tyler Gas which otherwise would have been payable according to the rates specified in their contract, Tyler Gas has not acquiesced in such alteration of rates or consented thereto. Tyler Gas promptly gave written notice to United that it did not consent to such change in rates from those specified in their contract and that any payments made pursuant thereto would be made under protest.

XI.

A. Contrary to the express covenants of its contractual obligations with Tyler Gas, and also in contravention of

its express representations to and contract with the City of Tyler, United is now seeking to put into effect very

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substantial increases in existing rates for gas which it delivers and sells to Tyler Gas for resale in the City of Tyler. In undertaking to accomplish this purpose, United filed with the Federal Power Commission, on or about June 24, 1953, a revised schedule of rates whereby it proposed a very large increase in all of the rates which it would charge Tyler Gas for gas delivered and sold to it, as follows: Twenty cents per thousand cubic feet for all gas sold up to eight times the "billing demand" (except gas resold for industrial purposes to McMurrey Refining Company), and twelve and five-tenths cents per thousand cubic feet for all gas in excess of eight times the "billing demand." The rate proposed to be charged in said schedule for gas sold to McMurrey Refining Company is thirteen cents per thousand cubic feet. The application of such rates as proposed by United in said schedule, if same should be permitted to be made effective, would require Tyler Gas to pay to United a sum equivalent to approximately 70 per cent more for gas purchased from United for resale to consumers in the City of Tyler than the amount that it is obligated to pay under the terms of the existing contract.

B. Both of the Plaintiffs, herein, Tyler Gas and the City of Tyler, have objected to the aforesaid proposed new schedule of rates, and each of said Plaintiffs has duly filed a protest thereunto with the Federal Power Commission. Likewise, both of the Plaintiffs herein have advised United of their objections to said proposed new schedule of rates and that they do not in any wise approve or consent to same. Plaintiffs have requested and strongly urged United that it do not attempt to put said new pro-

posed schedule of rates into effect in so far as same applies to gas sold and delivered by United to Tyler Gas for consumption in the City of Tyler, but United has wholly refused to accede to such request.

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XII.

A. The aforesaid revised schedule of rates proposed by United has not been approved or allowed by the Federal Power Commission, nor has said Commission determined that such rates are just, reasonable or lawful. The Plaintiff Tyler Gas, and also the Plaintiff City of Tyler, have intervened in said proceeding pending before the Federal Power Commission and have objected to and challenged the lawfulness of said proposed increased rates filed by United, and have alleged, inter alia, that such proposed rates are in violation of the existing contracts between United and Tyler Gas and between United and the City of Tyler. Such Pleas of Intervention are still pending before the Federal Power Commission and have not as yet been heard or considerd by said Commission. Although the Federal Power Commission has heretofore appointed a Trial Examiner to hear evidence regarding the lawfulness of said proposed rates, such hearings have not as yet been concluded before such Examiner and no report or recommendations have been made by such Examiner to the Commission respecting the lawfulness or reasonableness of such proposed rates. No Order directing the resumption of further hearings before such Examiner has been made, and it is not contemplated that further hearings will be resumed in the near future. Plaintiffs aver on information and belief that it may be reasonably anticipated that several months may elapse before the Federal Power Commission makes and enters its final Orders respecting the reasonableness, lawfulness and validity of said pro-

posed new schedule of rates as same are applicable to gas sold by United to Tyler Gas for resale to consumers in the City of Tyler.

B. Although United sought to make said new schedule of rates effective as of July 25, 1953, the Federal Power Commission, by Order made and entered on July 10, 1953, suspended the effectiveness of such new schedule of rates, as applicable

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to all gas sold by United to Tyler Gas—except that resold to McMurrey Refining Company—until December 25, 1953. Said Order of the Federal Power Commission recites that such suspension of said rates was necessary and proper in the public interest and that good cause exists for the Commission to enter upon a hearing to determine the lawfulness of such rates and that accordingly same be suspended pending such hearing and determination.

C. The aforesaid Order suspending said new schedule of rates was entered by the Federal Power Commission pursuant to the provisions of Section 4 of the Natural Gas Act (Sec. 717c-(e), Title 15, U.S.C.A.). However, said statute further provides that the authority of the Federal Power Commission to order such suspension of rates is restricted to a period of five months beyond the time such rates would otherwise have gone into effect, and that in the event the Commission shall not have concluded its consideration and determination of the reasonableness, lawfulness and validity of the proposed rates, then upon motion of the natural gas company filing such rates the same shall go into effect. Therefore, unless it is restrained and enjoined by Decree of this Honorable Court, United may avail itself of the aforesaid provisions of the Natural Gas Act, and upon making motion therefor after the expiration of said suspension period, on to-wit December 25, 1953, it can cause said rates to go into effect.

XIII.

Plaintiffs have urgently requested and demanded of United that it respect and abide by the terms of the existing contracts with Plaintiffs, and each of them, and that in any event United take no steps to put such new rates into effect by filing motion therefor, or otherwise, after the expiration of said period of suspension. However, United has definitely refused such request and demand by Plaintiffs, and has informed Plaintiffs that it proposes to file such motion and to take

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whatever other procedure may be required to put said proposed schedule of rates into effect directly after the expiration of said period of suspension on December 25, 1953.

XIX.

The existing rate schedule for the sale of gas by United to Tyler Gas, which is prescribed by the terms of the aforementioned contracts entered into by United and Tyler Gas and by United and the City of Tyler, is now in all things valid, lawful, subsisting and entitled to be upheld and sustained. Said rate schedule was negotiated and entered into in all good faith and for good and valuable considerations, and it was consummated on the strength of representations and commitments by United that the rates therein stipulated would be observed and adhered to, and would not be increased except to the extent of future taxes, during the period of sixteen years constituting the term of the Franchise granted by Tyler Gas to the City of Tyler. Such representations and agreement on the part of United were the moving and controlling considerations that induced Tyler Gas to propose the rates to the gas consuming public which were made part and parcel of said Franchise granted to it by the City of

Tyler. At the same time said representations and agreement on the part of United were the moving and controlling considerations that induced the City of Tyler to grant said Franchise to Tyler Gas. Except for such representations and agreements on the part of United said rate schedule would not have been proposed by Tyler Gas to the City of Tyler and said Franchise would not have been granted by the City of Tyler to Tyler Gas. The aforesaid contracts between United and Tyler Gas and between United and the City of Tyler are still in full force and effect, and by virtue of the facts and circumstances hereinbefore set forth United is now estopped to deny the validity of said contracts, or either of them, or the effectiveness of the rate schedule therein prescribed. Therefore, United should now be enjoined from undertaking to put into effect new rate schedules which propose to increase greatly the rates provided for in said contracts.

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XX.

A. Plaintiffs would respectfully show to the Court that unless the Defendant, the United, should be enjoined from taking steps to put into effect the new schedule of rates for gas sold by it to Tyler Gas, which it has filed with the Federal Power Commission, these Plaintiffs will suffer irreparable injury, and that they are without an adequate remedy at law. In this connection Plaintiffs say that if Tyler Gas should be compelled to pay to United the increased rates for gas stipulated in said proposed new schedule, which amount to approximately seventy per cent more than the rates prescribed by the aforesaid contracts, same will seriously impair the financial condition of Tyler Gas and seriously jeopardize its contractual obligations to serve the gas consuming public of the City of Tyler. That the financial resources of Tyler Gas are such

that it cannot long afford to pay such increased charges for gas without suffering financial disaster.

B. Furthermore, the serious impairment of the financial condition of Tyler Gas which would result from such proposed increase in rates, would operate to prevent Tyler Gas from carrying on normal and proper operations of its business. Especially would it be rendered impossible for Tyler Gas to finance needed extensions of its system within the corporate limits of the City of Tyler, which are required in order to meet the demands of the increasing population of said city and its increasing business and industrial activities.

C. That if Tyler gas should be compelled to pay to United the increased cost of gas which would be occasioned if said proposed new schedule of rates becomes effective, the same would be contrary to and in derogation of the public interest. The only source of distribution of gas which is now available to the gas consuming public of the City of Tyler is that which is owned and operated by Tyler Gas. The inhabitants

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of the City of Tyler depend and rely upon Tyler Gas as their only source of gas for heating and cooking purposes and the operation of gas-fired utilities. Likewise, the commercial and industrial enterprises located in the City of Tyler depend and rely upon Tyler Gas to furnish the gas necessary and requisite for conducting such enterprises. Therefore, the impairment of the ability of Tyler Gas to sell and distribute gas in the City of Tyler will result in suffering, distress and financial loss, in such manner and to such extent as can not be easily or readily ascertained.

WHEREFORE, Plaintiffs TYLER GAS SERVICE COMPANY and the CITY OF TYLER, and each of them, pray that upon the grounds above set forth Preliminary Injunction be issued

by this Honorable Court, after reasonable notice to the Defendant, enjoining the Defendant, UNITED GAS PIPE LINE COMPANY, its officers, servants, agents and employees, from undertaking to put into effect the proposed schedule of rates for sale of gas to Tyler Gas Service Company which Defendant has filed with the Federal Power Commission and which is now pending before said Commission for consideration and determination, and from violating the terms and provisions of the aforesaid existing contract entered into between United Gas Pipe Line Company and Tyler Gas Service Company, and also the aforesaid existing contract entered into between United Gas Pipe Line Company and the City of Tyler; and that upon trial of this cause such Injunction be made permanent; that the aforesaid contracts be declared to be in all things valid, subsisting and enforceable; and for such other and further relief, special and general, at law and in equity, as Plaintiffs may show themselves justly entitled to in the premises.

THOS. B. RAMEY
Thos. B. Ramey
Citizens Nat'l Bank Bldg.
Tyler, Texas

TROY SMITH
Troy Smith
Citizens Nat'l Bank Bldg.
Tyler, Texas
Attorney for Plaintiff,
CITY OF TYLER

BRYCE REA, JR.
Bryce Rea, Jr.
Wyatt Building
Washington, D. C.
Attorneys for Plaintiff,
TYLER GAS SERVICE COMPANY.

THE STATE OF TEXAS
COUNTY OF SMITH

BEFORE ME, the undersigned authority, on this day personally appeared THOS. B. RAMEY, Attorney for the Plaintiff TYLER GAS SERVICE COMPANY, and TROY SMITH, Attorney for the Plaintiff, City of Tyler, each being duly sworn, deposes and says:

That they, and each of them, have read the foregoing Complaint and know the contents thereof, and that the facts therein alleged are true and correct to the best of their knowledge, information and belief.

THOS. B. RAMEY
Thos. B. Ramey

TROY SMITH
Troy Smith

(SEAL)

SWORN TO AND SUBSCRIBED BEFORE ME by THOS. B. RAMEY and TROY SMITH, this the 8th day of December, A. D., 1953.

ALICE NIBLACK
(Alice Niblack) Notary Public in and for Smith County, Texas.

Exhibits A, B, and F to the Complaint for Injunction are also in the Record as Exhibits to the Motion of Petitioner Tyler Gas for Refund in Docket G-2210. They are printed in this Joint Appendix as part of said motion and appears at pages 157-164 hereof.

Exhibit C

SCHEDULE OF GAS RATES SUBMITTED BY TYLER GAS SERVICE COMPANY WITH PROPOSAL FOR FRANCHISE GRANTED BY CITY OF TYLER AND AUTHORIZED BY ORDINANCE

Domestic Service:

Available for all residential gas service.

Rate:	First	600 Cubic Feet per Month—12½¢	per CCF
	Next	22,000 Cubic Feet per Month—28¢	per MCF
	Next	75,000 Cubic Feet per Month—18¢	per MCF
	Excess	Cubic Feet per Month—16¢	per MCF
	Minimum monthly charge	—50¢	

Commercial Service:

Available for all commercial gas service.

Rate:	First	600 Cubic Feet per Month—12½¢	per CCF
	Next	22,000 Cubic Feet per Month—28¢	per MCF
	Next	75,000 Cubic Feet per Month—18¢	per MCF
	Next	100,000 Cubic Feet per Month—16¢	per MCF
	Excess	Cubic Feet per Month—15¢	per MCF
	Minimum monthly charge	—50¢	

The above rates for Domestic and Commercial Services are net and subject to an additional charge of 10% if bills are not paid within ten days after the date rendered.

Municipal Service:

Available for gas used by the City in municipal buildings and public schools.

Rate: 15¢ per 1,000 Cubic Feet
Minimum monthly charge—50¢

Industrial Service:

Classification of Service:

This rate applies to gas used in steam boilers or in gas engines for power purposes, or for heat in manufacturing

and industrial processing, and for necessary space heating in the buildings in which such manufacturing and industrial processing is performed.

Monthly Rate:

					Maximum Billing
14¢ per MCF for deliveries between	,000	&	500,000	Cu. Ft.	$ 65.13
13¢ per MCF for deliveries between	501,000	&	1,000,000	Cu. Ft.	120.12
12¢ per MCF for deliveries between	1,001,000	&	5,000,000	Cu. Ft.	500.10
10¢ per MCF for deliveries between	5,001,000	&	10,000,000	Cu. Ft.	900.09
9¢ per MCF for deliveries between	10,001,000	&	20,000,000	Cu. Ft.	1,600.08
8¢ per MCF for deliveries between	20,001,000	&	25,000,000	Cu. Ft.	

Rates for deliveries in excess of 25,000,000 Cubic Feet per Month by special contract.

The maximum amount payable for the total monthly deliveries shall never exceed the amount shown as "Maximum Billing" for the bracket in which the total deliveries fall.

Minimum Charge—$1.50 per month.

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EXHIBIT D

(Filed July 2, 1956)

Part of Exhibit I to United Amended Answer to Motion to Reject

TYLER GAS SERVICE COMPANY
Tyler, Texas

March 1, 1946

To the Commission of the City of Tyler
Tyler, Texas

Gentlemen:

In connection with the application for a franchise in favor of the Tyler Gas Service Company, which is now pending before you, we beg to submit herewith a further revised

schedule of rates for gas consumed containing a substantial reduction in rates previously submitted. This company agrees that the attached schedule of rates may be made effective upon the final adoption of said franchise.

The Tyler Gas Service Company further agrees that such rates as stipulated in said schedule herewith submitted may not be increased during the life of such franchise, except only to compensate for tax increases, as provided in the franchise.

Very truly yours,

TYLER GAS SERVICE COMPANY,

By E. CHANDLER BEACH
President.

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Exhibit E

UNITED GAS PIPE LINE COMPANY
SHREVEPORT 92, LOUISIANA

April 3, 1946

The Commission of the City of Tyler
Tyler, Texas

Gentlemen:

In accordance with our previous commitment, as contained in telegram to Mr. Ramey, attorney for Tyler Gas Service Company, dated February 28, 1946, we beg to advise as follows:

That when the new franchise now proposed by the Tyler Gas Service Company becomes effective, the United Gas Pipe Line Company agrees to sell gas to the Tyler Gas Service Company, delivered at the City gate, for domestic and commercial consumption, at the rate of 12¢ per thou-

sand cubic feet; and it also agrees to the schedule of rates proposed by the Tyler Gas Service Company for industrial gas, in which this company participates on a percentage basis according to its contract with Tyler Gas Service Company, as amended, provided that United Gas Pipe Line Company shall not receive less than 7.2¢ for any industrial gas deliveries. In the event the City of Tyler should exercise the privilege contained in said franchise to acquire the property of the Tyler Gas Service Company, the United Gas Pipe Line Company agrees to afford the City of Tyler, or its assigns, the privilege of purchasing gas from it at the aforesaid rates. The United Gas Pipe Line Company further agrees that such rates shall be the maximum rates which it shall charge for such gas for a period of sixteen years, subject to such increases therein as may be occasioned by increases in existing gross production taxes, severance taxes, pipe line taxes, and other taxes except ad valorem and income taxes.

Yours very truly,

UNITED GAS PIPE LINE COMPANY
By R. H. HARGROVE
Vice President

RHH M

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Exhibit J

Filed December 14, 1953

Civil Action No. 1662

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

TYLER GAS SERVICE COMPANY, a Texas corporation, and THE CITY OF TYLER, TEXAS, a municipal corporation,
Plaintiffs,

VS.

UNITED GAS PIPE LINE COMPANY, a Delaware corporation,
Defendant.

To the Honorable Judge of said United States District Court:

Now Comes United Gas Pipe Line Company, Defendant in the above cause, and having been served with the notice and order of hearing on application for temporary injunction, files herewith its Original Answer in answer to the complaint for injunction heretofore filed herein, and respectfully shows to the Court:

1.

It moves this Court to dismiss the complaint for injunction for lack of jurisdiction, and shows that this Court is without any power or authority in the premises, and is without jurisdiction for the following reasons, to-wit:

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(2) That Plaintiffs seek to enjoin compliance by Defendant with the provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, et seq.; amended Feb. 7, 1942, c. 47, 56 Stat. 83, amended July 25, 1947, c. 333,

61 Stat. 459; 15 U.S.C. 717-717w,) and more particularly Section 4 of said Act dealing with rates, and for injunctory relief to the effect that a contract alleged to exist between Plaintiffs and Defendants is superior to the administrative duties, rights, powers, and obligations of Defendant as a natural gas company under the terms of the Natural Gas Act and of the Federal Power Commission as the Administrator of said Act, all of which questions by the terms and provisions of the Natural Gas Act are given to the exclusive jurisdiction, power and authority of the Federal Power Commission and not open to judicial review save and except only in accordance with the review provisions of Section 19(b) of the Act, which latter does not permit or contemplate actions within the cognizance of the United States District Court.

(b) That the issues sought to be litigated here and for which injunctory relief is sought involve the rights, powers, and duties of the Defendant to the Federal Power Commission, and the right, power, authority and jurisdiction of that Commission in respect of matters confided solely to the jurisdiction of that Commission by the Natural Gas Act, therefore not within the jurisdiction or authority of this Court to hear and determine.

(c) No private contract such as that alleged by plaintiffs herein may be validly made or enforced or relied upon which purports, or is contended, to deprive, restrict, impair or destroy any right or duty of a natural gas company, or the Federal Power Commission, as required by the terms of the Natural Gas Act, and any and all contractual provisions at variance therewith are

wholly void and unenforceable. Defendant is a natural gas company, subject to the jurisdiction of the Federal Power Commission under the said Act, and the bill of complaint

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shows upon its face that the rates and applications thereabout are already within the active jurisdiction of the Federal Power Commission in proceedings to which the plaintiffs herein are parties.

(d) Only just and reasonable rates may be charged by Defendant as a natural gas company in respect of service subject to the jurisdiction of the Federal Power Commission, and this Defendant has the duty under the Natural Gas Act, including Section 4(d) to propose for Commission approval or acceptance, rates or changes in rates, which are just and reasonable and not discriminatory; and the Commission itself, or, under complaint of any of those persons specified in Section 5(a) of the Act, has the power to investigate and determine the reasonableness of rates, and such powers, rights and duties of natural gas companies, their contractees, and the Commission cannot be changed, altered, restricted, destroyed, delayed, enjoined, or in any manner interfered with by any contract or contractual provision between the natural gas company and any of its customers so that Defendant and the Tyler Gas Service Company, as a matter of law, were not and are not now free validly to contract in derogation of any of the terms and provisions of the Natural Gas Act, or the exercise of rights and duties permitted and required by that Act either upon Defendant or the Commission, and this Honorable Court is without any right, power, jurisdiction or authority to enjoin any step or act, either directly or indirectly,

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contemplated, required, or permitted by said Act and given to the exclusive jurisdiction of said Commission.

(e) All of the provisions of the contract and all amendments thereto between Defendant and Tyler Gas Service Company, the conversion tariff filed by Defendant, and

the application docketed in Docket G-2210, to which proceedings the Plaintiffs are parties and intervenors, are as to Defendant and said Plaintiffs wholly and in all things subject to the Commission's powers and duties under the act, and any contractual provision therein which would prevent or restrict, or tend to prevent or restrict, the free exercise and performance of the duties and powers given to and imposed upon Defendant as a natural gas company and the Federal Power Commission as the Administrator of the Act, as a matter of law, are inoperative, unenforceable, and invalid.

(f) Rate making and regulation by the Commission is a legislative function under the Act, in no wise subject to any private or contractual obligation, and the respective rights, duties, and powers under the Act, including Sections 4 and 5, are in all respects superior to contractual provisions, and this Honorable Court is without any power or jurisdiction or authority to direct, control, regulate, prevent, enjoin, or in any other fashion interfere with the untrammeled administration of said Act by the said Commission as contemplated by law.

(g) Any contractual provision approved or merely accepted by the Federal Power Commission or a rate fixed or merely accepted or permitted to be filed and become operative by the Federal Power Commission is always

subject to the rights and duties of Defendant as a natural gas company and to the Commission under said Act, including Sections 4 and 5 to propose and fix just and reasonable rates. The effect of issuing the judgment and injunctions sought by Plaintiffs in this case would be to annul and cancel the applicability of Section 4, and particularly sub-division (e) of Section 4 of the Act as to Defendant, which would be against public policy, for one

subject to regulation may not impair, interfere with or defeat such regulation by contractual provision which would have effect to rescind and annul a statute, or any part thereof, and this result would follow if the contract between Plaintiff Tyler Gas Service Company and Defendant prevents, as said Plaintiff contends, Defendant from relying upon or complying with Section 4(e). The Natural Gas Act contemplates and requires that any increase of a rate can only be accomplished by a filing act of the natural gas company under Section 4, and upon such filing the Federal Power Commission under Section 4(d) of said Act is then authorized to permit the same to become effective without hearing, or by Section 4(e) to require a hearing "concerning the lawfulness of such rate" proposed, nor is the exercise of such duties and powers by the Commission or the right by the natural gas company conditioned by the Act upon a prior hearing or completed hearing under any section of the said Act so that the granting of an injunction in terms as sought by Plaintiffs in this case would be for this Honorable Court to substitute its judgment and direction and control for the exclusive discretion of the administrative agency to whose sole authority and jurisdiction

the Natural Gas Act commits all of such matters, including the propriety of the very matters sought to be enjoined here.

(h) On June 25, 1953, Defendant filed its application for increased of certain classes of service, including that to the Plaintiff Tyler Gas Service Company, to wit: Tariff IND-C, Large Volume Industrial Use only for the Central Zone, Second Revised Sheet No. 31, and First Revised Sheet No. 32, which the said Federal Power Commission by its order of July 10, 1953, permitted to go into effect

as of July 25, 1953, without suspension, since under the express terms of the Natural Gas Act the same could not be suspended; that said rate is applicable to the Plaintiff Tyler Gas Service Company for its resale for industrial purposes to the McMurray Refining Company situated at Tyler, Texas; that said order of the Commission in respect of said Tariff IND-C is res judicata between the parties hereto and binding on the Plaintiffs and on this Honorable Court; and furthermore is the only lawful rate, since a filed rate, whether fixed or merely accepted by the Commission, is the only lawful rate. Copy of said order of July 10, 1953, marked Exhibit "C" is attached hereto and made a part hereof.

That in the same filing Tariff DG-C, General Service Large Volume Distributors for the Central Rate Zone, First Revised Sheets Nos. 4 and 5 applicable to Tyler Gas Service Company among others, was by the same order of July 10, 1953 suspended as permitted by the provisions of Section 4 of the Natural Gas Act, and all questions and issues with respect to said suspended rates in every particular, including the right of Defendant by Motion to make said rates effective at the end of the suspended period, or, to wit, on December 25, 1953,

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is wholly and solely and only vested by the terms of the Natural Gas Act in the Federal Power Commission, and this Honorable Court is without jurisdiction, power, or authority to assume the rate making authority exclusively granted to said Commission.

(i) Said Tariff DG-C is applicable also to the towns and cities of Kilgore, Texas; Longview, Texas; Marshall, Texas; Monroe, Louisiana; West Monroe, Louisiana; and United Gas Corporation, a Delaware Corporation with its principal office and place of business in Shreveport, Louisi-

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ana, the latter three of which are beyond the jurisdiction of this Court, yet are indispensable parties for this Court to enjoin compliance with the Natural Gas Act and its administration by the Federal Power Commission, and to enjoin the putting into effect of Tariff DG-C as sought and prayed by the Plaintiffs herein would necessarily affect said towns and said Company, and also for the additional reason that the Federal Power Commission and the members thereof would be indispensable parties since the terms of any injunction issued, if such should be issued by this Honorable Court as sought by Plaintiffs, would necessarily have to enjoin the performance of their official duties upon said Commission, and the said Commission and its members are not suable in the Eastern District of Texas, and neither jurisdiction nor venue may be had over them in said District, but jurisdiction can only be had over them as provided by law in the District of Columbia.

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Any order of this Honorable Court purporting to enjoin IND-C, the Large Volume of Industrial Tariff above described, would be to require the Federal Power Commission to annul and withdraw an order heretofore issued by it and which is susceptible to judicial review only in accordance with the terms of Section 19(b) of the Natural Gas Act, and Defendant says that this Honorable Court is not a court permitted by said Section 19(b) to review any act or order of the Federal Power Commission; furthermore, that said order putting into effect Tariff IND-C is solely within the competence of the Federal Power Commission and is now a final order binding on the parties hereto and this Honorable Court.

Said tariff IND-C is applicable to Plaintiff Tyler Gas Service Company for its industrial resale to McMurray Refining Company, and in addition is applicable to the

following: The delivery at Shreveport, Louisiana to Arkansas-Louisiana Gas Company, a corporation organized pursuant to the laws of the State of Delaware and with its principal offices in Shreveport, Louisiana; to Southwestern Gas & Electric Company, a corporation organized pursuant to the laws of the State of Delaware, with its principal office in Shreveport, Louisiana; for delivery to it at Mooringsport, Louisiana for the Liebermann Power Plant; to United Gas Corporation, a corporation organized pursuant to the laws of the State of Delaware with its office and principal place of business in Shreveport, Louisiana; to the Marshall Brick Company, at Marshall, Texas; to the Morton Salt Company at Grand Saline, Texas; to the Power Plant of the City of Monroe, at Monroe, Louisiana; that each and all of such named parties except those resident in the State of Texas, are beyond the jurisdiction of this

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Court, but they, together with the Federal Power Commission and the members thereof are indispensable parties to an injunctory proceeding involving tariff IND-C for the reasons above set forth, and additionally for the reason that if this Honorable Court should issue the injunction sought by Plaintiffs it would have to establish by decree as in the case of tariff DG-C the reasonable rates to be charged, and thus if this Court is to fix and regulate rates, which power is solely vested in the Federal Power Commission, all of such parties to be affected thereby would necessarily have to be before the Court, but such parties not being available to the Court the Court is without jurisdiction to give the relief for want of indispensable parties.

(j) The order of July 10, 1953, of the Federal Power Commission permitting Tariff IND-C to go into effect as of July 25, 1953, and suspending Tariff GD-C for a period of

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five months together with the sole and exclusive right to determine and entertain and act upon a motion under Section 4(e) of said Act to put said Tariff DG-C into effect is a valid and binding order upon the Plaintiffs herein, and if said rates are permitted to go into effect on December 25, 1953, as required by the terms and provisions of Section 4(e) of the Natural Gas Act are and will be the only effective and lawful rate which Defendant can lawfully charge Plaintiff Tyler Gas Service Company and which said Plaintiff can lawfully pay pending the hearing upon the same in Docket G-2210 and is therefore conclusive upon the Plaintiffs and cannot be collaterally attacked in this independent proceeding.

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(k) Section 4(e) of the Natural Gas Act gives the Federal Power Commission the sole discretion to suspend operation of certain types of rates, inclusive of Rate DG-C, and further provides that if the said Commission in its discretion does suspend such rates it shall have the further discretion, upon the same becoming effective prior to completion of the hearing, to require a bond upon condition of refund whereas such powers and discretion with reference to gas sold for resale and subject to the power of suspension is solely vested in the jurisdiction and power of the Federal Power Commission, and furthermore the provision of said Act upon the expiration of the statutory period of suspension becomes obligatory and is not subject to be interferred with by an order of any Court other than a judicial review under Section 19(b) of said Act, and any interference such as with an order of injunction or judgment as sought herein would be for this Court to substitute its own rate making powers for those of the Commission, which it is without authority and jurisdiction at the law, so to do.

(1) For this Honorable Court to issue a judgment with injunctory relief such as is sought and prayed for by Plaintiffs herein would:

(1) Constitute rate making by this Court contrary to the exclusive reservation of that duty to the Federal Power Commission by the terms of the Act, because the Tariffs DG-C and IND-C are indivisible tariffs applicable to others than Tyler Gas Service Company, and the effect of such order and injunction would be a determination by this Court that such proposed rates permitted and required by the Natural Gas Act are unreasonable or improper, a power and function solely given to the Commission.

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(2) Would require violation by Defendant of Sections 4(a), (b) and (d) of the Natural Gas Act;

(3) Would require violation by Plaintiffs and this Defendant of Section 154.21 of the General Rules and Regulations of the Federal Power Commission issued pursuant to the authority and directions of the Natural Gas Act providing

> "The Effective Tariff of a natural gas company shall be the Tariff filed pursuant to the requirements of this Part, and permitted by the Commission to become effective. No natural gas company shall directly or indirectly demand, charge, or collect any rate for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, or impose any classifications, practices, rules or regulations different from those described in its effective Tariff and executed service agreements on file with the Commission, unless otherwise specifically provided by Order of the Commission."

The entry by this Court of a judgment with injunctory relief such as is sought by the Plaintiffs here would be to

prevent the Federal Power Commission from making effective, in accordance with Section 4(e) of said Act the rates now on file and suspended by it, and thus permitted by it to be filed, and which it is compelled to permit effective at the expiration of five months, and would further be to compel said Commission to act and designate as the only filed rate, the rates superseded by the filing in Docket G-2240, which is beyond the power, authority and jurisdiction of this Honorable Court.

(m) The Plaintiffs under the guise of suing under the general equity jurisdiction of this Court for declarations of contractual validity and injunction in the terms sought cannot by such indirection secure determination on rates

and claim superiority of contract provisions which are exclusively reserved by the Natural Gas Act to the Federal Power Commission in the first instance, and this Honorable Court is without power, jurisdiction or authority so to adjudge.

(n) The Natural Gas Act and all rules and regulations lawfully promulgated by the Federal Power Commission under the authority of that Act are by operation of law imported into the contract and all amendments thereto between this Defendant and the Plaintiff Tyler Gas Service Company, whereby said contract and all rights claimed or granted thereby are in all things subject to and inferior to the Natural Gas Act and the administration of the Federal Power Commission thereunder, including the right, power and duty on Defendant as a natural gas company, and on the said Commission under Section 4(e) for the ministerial act of making effective a suspended rate as provided by the terms of Section 4(e) of the Act.

(o) The entry of judgment with injunctory relief such as is sought by Plaintiffs herein would have effect to restrain

administration of the Natural Gas Act pending entry of final judgment by the Commission on a portion of rate making and regulation on which unlimited discretion for all phases thereof is vested in said Commission, so that this Honorable Court is without power, jurisdiction and authority to restrain the administration of a portion of said Act to determine whether errors of fact or of law may be committed by said Commission in the course of the hearing or to determine whether such administrative agency may exceed its jurisdiction: All of these matters, if available at any time to

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to Plaintiffs, or anyone similarly situated, are available solely and under a proper review permissible in accordance with Section 19(b) of the Natural Gas Act.

(p) Because said complaint shows on its fact that all of the subject matter of this suit is now properly and validly pending before the Federal Power Commission in Docket G-2210; that Plaintiffs have intervened in said cause; that prior to intervention they had been served with due process and notice thereof as required by the rules and regulations of the Federal Power Commission; that they are parties to said cause, and that all of the matters, facts and issues sought to be submitted here have already been submitted by the Plaintiffs to the Federal Power Commission which is competent at the law to hear and determine the matters posed by the Plaintiffs and to determine whether they constitute the basis of any right to relief, and that said hearing is in course and is not completed.

WHEREBY for each and all of the reasons above set out Defendant prays the judgment of this its motion to dismiss for want of jurisdiction, power and authority to entertain this cause, or to hear and determine the pur-

ported subject matter of this suit, for all costs, and for such other orders as the Court may deem proper.

2.

Defendant moves to dismiss the complaint herein for failure to state a claim upon which relief can be granted for the following reasons, to-wit:

(a) For each and all of the reasons set out in sub-paragraphs (a) through (p), inclusive, of paragraph 1 hereof, the same as though they were each and all set out herein seriatim.

(b) Because said petition on its face shows that there is a complete and adequate remedy at law, to-wit, two administrative remedies, neither of which have been exhausted by Plaintiffs, as follows, to-wit:

(1) Said complaint shows upon its face that Plaintiffs have intervened in and are now active parties to Docket G-2210, which is pending to determine the amount of increase, if any, which the Federal Power Commission will finally permit and authorize pursuant to the application for increase now the subject of the hearing, and that said Plaintiffs are thus empowered to adduce any evidence in their possession on the question of the right and justification to the Defendant to the increase sought, including the force and effect, if any, of the contentions made herein based upon the contract between Defendant and Tyler Gas Service Company.

(2) Secondly, an adequate remedy at law exists because the Plaintiff, Tyler Gas Service Company, is free and has at all times been free since the filing by Defendant of its application for increase on June 25, 1953, to apply to the City of Tyler for an increase of rates, which the City of Tyler is obligated to receive, process, hear, and determine

in accordance with its undoubted and absolute legal duty in the discharge of its legislative function to fix and regulate rates, not only to the end that the consumer-customers of Tyler Gas Service Company are protected against the payment of an improper rate, but also that the rates and return to be had by Tyler Gas Service Company from its consumer-customers shall be sufficient to preserve Tyler Gas Service Company in a going and proper position validly, effectively and efficiently to render

to the public the service as a utility which it is obligated to maintain and deliver, and furthermore if the City of Tyler does not in the discharge of its governmental and legislative function properly handle and dispose of said application for increase, the Tyler Gas Service Company is by the laws of the State of Texas, vouchsafed an appeal to the Railroad Commission of Texas, and thereafter to the Courts of Texas, and thus it has an adequate remedy at law.

(c) Said complaint on its face shows that Plaintiffs have not suffered any irreparable injury; that if there be any injury at all, which is denied, to the Plaintiff Tyler Gas Service Company, such injury is not only not irreparable but is an injury resulting from the very terms of the Natural Gas Act. The only injury alleged is that the Plaintiff Tyler Gas Service Company is uncertain and not informed as to what the terms of the final order of the Federal Power Commission may be, and that if rates under suspension are effectuated as provided by Section 4(e) of the Natural Gas Act and then not wholly sustained by the Federal Power Commission, it could suffer a monetary damage by having to pay such rates pending entry of final judgment, and that the requirement of a bond by the Federal Power Commission, if required, would not protect. Defendant says that if such constitutes an injury it is the

inevitable and necessary results of the provisions of the Natural Gas Act and exists and applies alike to each and every customer and purchaser from a natural gas company between the expiration date of the suspension period and consequent effective application of increased rates and the entry of final judgment, and furnishes no ground of injury or basis for another position of this Court as a court of equity but is redressable

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only at the hands of Congress through amendment of the Act; that every such purchaser is under the same compulsion, nor does the Act permit the interference of the judicial power under the claim of preservation of the status quo, or any other claim which would have effect to interfere with or prevent administration by the Commission as required by the Act, and such judicial invasion of the discretionary and obligatory administrative function upon the Commission would be destructive of the mandatory requirements of the law itself. The same "injury" is also worked by the express terms of the Act upon the natural gas company, for if an increase in rates be requisite for the natural gas company properly to render services required by the public interest, the time lag between the preparation of an application for increase, its filing, and the five months suspension requires the natural gas company to operate at a loss which cannot be recouped in any fashion upon the entry of final judgment by the Commission. Inconvenience, injury or damage necessarily resulting from the administration of the Act does not create power, authority and jurisdiction in this Honorable Court to create a remedy not permitted or stipulated by Congress in the Act itself, and is an inconvenience, injury or damage which only Congress can redress.

(d) Because the issues sought to be tendered here have already been tendered by Plaintiff Tyler Gas Service Com-

pany to the Federal Power Commission, and by that Commission adjudicated adversely to Tyler Gas Service Company, which adjudication is res judicata of the issues now sought to be raised herein, all of which appears from the following matters:

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Paragraph X of the complaint refers to the filing of the conversion tariff containing schedule of rates as required by the Rules and Regulations of the Railroad Commission. Reference is made to said paragraph X for identification of the allegations thereabout. Said conversion tariff was filed not on July 1, 1952, but on July 3, 1952, in Docket G-2019, now consolidated with Docket G-2210, containing the application of defendant for an increase of rates, said tariff being filed in accordance with Section 154.85 of the Commissions' Regulations. These regulations, among other things, prohibited as contrary to the Natural Gas Act percentage arrangements and automatic tax increase arrangements similar to those contained in the contract between defendant and Tyler Gas Service Company. Defendant unsuccessfully contested this by litigation reported under the style United Gas Pipe Line Company vs. Federal Power Commission, 181 F. 2d 796, certiorari denied 340 U. S. 827, 71 S. Ct. 63, 95 L. Ed. 607, and pursuant to said Regulations filed the so-called conversion tariff. Thereupon and on July 16, 1952, pursuant to notice from the Federal Power Commission, Plaintiff Tyler Gas Service Company forwarded to said Commission its objections to the conversion tariff termed in said objections as "proposed increases", a copy of which objections was forwarded by Plaintiff Tyler Gas Service Company to defendant, a photostatic copy of which duly signed by J. W. Hickman, President of the plaintiff company, is attached hereto marked Exhibit "A" for the

purpose of identifying the objections made to said conversion tariff, and

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for the purpose of showing that the objections therein contained are all asserted in the bill of complaint not only in sub-division X but in the other parts of said complaint, and with reference to the application for increased rates contained in Docket G-2210. Thereafter on or about July 31, 1952, the Federal Power Commission entered its order styled "Order Allowing Conversion Tariff to Become Effective, in part, Suspending Conversion Tariff, in part, and Suspending Notice of Cancellation," a copy of which is marked Exhibit "B" hereto attached and hereof made a part. United shows that the conversion tariff applicable to Tyler Gas Service Company was not suspended by said order, and that by the terms of said order the Federal Power Commission rejected, denied and overruled the objections of the plaintiff Tyler Gas Service Company contained in its objections dated July 16, 1952, and filed with the Federal Power Commission, marked Exhibit "A" hereto, whereby by said order the contentions of the said Tyler Gas Service Company are adjudicated and held to be no obstacle or impediment or ground of valid objection to the proper performance and consideration by the Federal Power Commission of its undoubted duty and obligation under the Natural Gas Act to fix and regulate rates; that Tyler Gas Service Company did not within the time permitted by Section 19(b) of said Act assert that it was "aggrieved" by said order and seek a judicial review, whereby said order is now final and is conclusive and binding on all of the parties hereto, and on this Honorable Court.

WHEREFORE, premises considered, Defendant prays judgment of this Court of its motion to dismiss this cause for

failure to state a claim upon which relief can be granted, for all costs, and for such other orders as the Court may deem proper.

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3.

Defendant moves to dismiss this cause as to the Plaintiff the City of Tyler, Texas, for the reason that the said City of Tyler has no capacity to sue in respect of any of the matters involved herein for the following reasons, to-wit:

(a) The City of Tyler is not a party to the contract between Defendant and the Plaintiff Tyler Gas Service Company for service and sale of natural gas, which contract is wholly and solely and only subject to regulation by the Federal Power Commission; nor does the City of Tyler have any right or power to force or compel compliance by Defendant with any term of said contract to which it is a stranger; that the so-called "agreement" purportedly embodied in a letter to the Commission of the City of Tyler from R. H. Hargrove, Vice President of United Gas Pipe Line Company dated April 3, 1946 and attached as Exhibit "E" to said petition is not a part of nor an amendment to the contract between Defendant and Tyler Gas Servic Company, is not and never has been filed to the Federal Power Commission, does not constitute a contract, nor does it obligate defendant to sell or deliver any gas to the City of Tyler, nor is there any consideration moving to Defendant from the so-called "acceptance" by the City of Tyler of said letter, so that the said City of Tyler is not the real party at interest and has no rights of any kind, direct or indirect, in the performance of the contract between Defendant and the Plaintiff Tyler Gas Service Company about which it can either be heard or for which it is at the law authorized to enforce, nor does the

City of Tyler have or exhibit upon the face of said complaint any right to any service from Defendant as a natural gas service subject to the jurisdiction of the Federal Power Commission.

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FIRST DEFENSE

4.

Defendant admits the allegations of residence of the several parties as contained in paragraph I, but denies that there is or can be Three Thousand Dollars ($3,000.00) or the value of Three Thousand Dollars ($3,000.00) in controversy by virtue of the matters set out in the complaint in that the matters set out in the complaint are shown to be the dissatisfaction of the Plaintiffs with applications for increases in rates solely cognizable by the Federal Power Commission and not subject to cognizance by this Court and hence denies jurisdiction.

5.

Defendant admits the first sentence of sub-division A; but denies the second sentence as written and shows that Defendant is engaged in the business of gathering, transporting, and selling gas both in intrastate commerce; and in interstate commerce for resale to distributors thereof for public consumption, to other pipeline companies, and direct to industrial users; that its inte state operations make it a natural gas company within the terms of the Natural Gas Act (15 U.S.C. 717-717w) and thereby subject to the jurisdiction and regulation of the Federal Power Commission; and that that portion of its facilities from which service and delivery to Tyler Gas Service Company at the city gate of Tyler, Texas, in the Eastern District of Texas, Tyler Division, is made is a part of its natural gas facilities subject to the exclusive regulation, control and

jurisdiction of the Federal Power Commission under and in accordance with the terms of the Natural Gas Act.

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It admits that on or about November 22, 1940, it entered into a written contract with Plaintiff Tyler Gas Service Company, which has been from time to time amended and supplemented; it says that said contract and its supplements and amendments are the best evidence of its terms and speak for themselves, and accordingly it denies all allegations contained in parts B, C, and D of Section II about is content and effect.

6.

It admits all of the facts alleged in Section III of said complaint, but denies all allegations of the purport and effect of the writings and the acts of the parties therein mentioned; it denies all allegations relative to the intent, motives, and purposes of the various parties in performing the acts or making and delivering the various written matters identified and listed as exhibits, and denies all allegations descriptive of the purport and effect of the content of any of the writings referred to and says that such writings, if relevant and material, are the best evidence of their content and speak for themselves.

7.

It admits that Exhibit "D," a letter from Tyler Gas Service Company, was sent to the City Commission of Tyler containing Exhibit "C" and that the City Commission of the City of Tyler ultimately issued a franchise to Plaintiff Tyler Gas Service Company; but it has no knowledge of any of the other matters alleged in paragraph IV and so denies the same. It denies that Exhibit "D" was a proposal or became an agreement with the City of Tyler since the City of

Tyler was and is without any power to make any agreement respecting utility rates, it having no express power thereto contained in its Charter, to which reference is made, so that neither the City of Tyler nor the Plaintiff Tyler Gas Service Company were at law authorized or competent to make such a contract in derogation of the governmental and legislative function and duty of the City of Tyler to fix and regulate utility rates for gas of the Tyler Gas Service Company.

8.

Answering Section V of said complaint, defendant admits that R. H. Hargrove, Defendant's Vice President, on April 3, 1946, wrote and forwarded to the Commission of the City of Tyler the letter which is marked Exhibit "E" attached to the complaint, but denies all allegations thereabout contained in said Section V, and expressly denies that the same constituted any "commitment" or "direct written obligation to the City of Tyler" or an "agreement" and says that it was without any lawful or legal power or authority to execute any such agreement in derogation of its rights and duties and obligations under the Natural Gas Act, or which would in any manner affect, prejudice, impair, destroy, obstruct or prevent the untrammeled and unhampered regulation and control of its rates by the Federal Power Commission in accordance with the terms and provisions of the Natural Gas Act passed by the Congress of the United States, and for the same reason denies that the same letter was or could be at law "accepted as a contract between United and the City of Tyler" as alleged, and further that it could not be bound by the ex parte passage or content of any of the Minutes of the City Commission of the City of Tyler, fragmentary excerpts of which are marked Exhibit "F" and attached to said petition, nor could the same constitute a contract.

9.

Section VI of the complaint does not contain any allegation of fact, but purports to contain the plaintiffs' conclusions, interpretation and construction of an ordinance and of the franchise granted by the City of Tyler to the Plaintiff Tyler Gas Service Company. Defendant says that the said ordinance and the franchise are the best evidence of their terms, speak for themselves, and insofar as they have relevancy are to be interpreted and construed by the Court herein, if construction becomes proper or necessary. It expressly denies, however, that the quoted provision purportedly from Section VI of the franchise prohibiting the increase of rates was or is valid, or enforceable, because beyond the capacity and power either of the Tyler Gas Service Company or the City of Tyler to make or to insert in a franchise respecting utility rates, the City of Tyler being without any express charter or power to make agreements or "stipulations" respecting utility rates for gas, and the same being in derogation of the performance by the City of Tyler of its legislative and governmental function to fix and regulate utility rates, whereby the said City of Tyler was and is without any authority or power whatever to adopt the franchise, or any such provision in it "as a contract between the City of Tyler and Tyler Gas", and any acts purporting to designate, identify or establish the same as a contract were and are void and ineffectual.

10.

Answering Section VII: Certain references to amendatory agreements are so mixed with other allegations which cannot be admitted that Defendant denies Section VII.

It shows that the true facts are as follows: The original contract of date November 22, 1940 between Defendant and Plaintiff Tyler Gas Service Company was filed on January 3, 1941, with the Federal Power Commission as rate schedule F.P.C. No. 42, contract No. T 10 to be effective as of November 5, 1940, and with it as supplement No. 1, to be effective on the same date, a letter of November 20, 1940, relative to consent by Defendant to accept eighty percent (80%) of the proceeds of sale to certain industrial customers in accordance with said letter. The contract and supplement No. 1 were permitted to be filed by order of the Federal Power Commission dated February 12, 1941, which in paragraph "(C)" provided

> "Nothing contained in this order shall be construed as a waiver of the requirements of Section 7(b) of the Natural Gas Act; nor shall it be construed as constituting approval by this Commission of any rate, provision, or condition contained in the contract referred to herein;"

that thereafter Supplement No. 2, being an amendatory agreement dated April 5, 1943, was filed as of April 1, 1943, to be effective as of April 10, 1943, making certain changes in certain rates not material to this controversy; that thereafter on or about 28 May, 1946 supplement No. 3 was executed, being filed with the Federal Power Commission on June 17, 1946, effective as of May 1, 1946, and which was an amendatory agreement dealing solely and only with the establishment of additional delivery points and the accounting procedures to cover the deliveries thereat; that thereafter on or about the 29th day of May, 1946, a further amendatory agreement was executed, being filed with the Federal Power Commission on June 17, 1946, and effective as of May 2, 1946,

being described as supplement No. 4 amending Article VII of the contract of November 22, 1940, and setting up a new scale of rates as therein is set forth, containing a so-called "tax adjustment clause" and thereafter on or about May 21, 1946 Defendant wrote a letter to Plaintiff Tyler Gas Service Company consenting upon the conditions of the letter of May 21, 1946 to a request thereabout contained in a letter of May 15, 1946 to it from the Plaintiff Tyler Gas Service Company respecting industrial rates which letters were filed as supplement No. 5 with the Federal Power Commission on June 17, 1946, effective as of May 10, 1946.

That supplements 3, 4, and 5, all bearing date of May, 1946, were each and all permitted to be filed and become effective by the Federal Power Commission, but Defendant would show that none of them contained any provisions with respect to maximum rates such as are contained in Exhibit "E" attached to the bill of complaint, being the letter of R. H. Hargrove of date April 3, 1946, nor provisions with respect to maximum rates such as are alleged to be quoted from Section VI of the franchise in Section VI of the bill of complaint; nor did the plaintiff City of Tyler ever seek or attempt to file with the Federal Power Commission either the letter of April 3, 1946, from R. H. Hargrove, being Exhibit "E" to the bill of complaint, or in whole or in part the Minutes purported to be contained in Exhibit "F" as a contract or schedule of rates covering service to be rendered by Defendant, nor did the Plaintiff Tyler Gas Service Company ever purport to file with the Federal Power Commission Section VI of its franchise as any agreement or provision governing the character of rates and service to be rendered by Defendant to it, nor

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did the Plaintiff Tyler Gas Service Company ever assert or claim any such right or obligation until its objections filed in its letter of July 16, 1952, being Exhibit "A" to the motions hereinabove, which was promptly denied, rejected and overruled by the Federal Power Commission in its order of July 31, 1952, marked Exhibit "B" and attached to the motions hereinabove set forth.

11.

Answering Section VIII part A; Defendant admits that the amendatory agreement described as supplements 3, 4, and 5 were duly filed by Defendant with the Federal Power Commission as shown above, but denies that they were requested or permitted to take effect as of May 1, 1946, and shows that Supplement No. 3, which provided only for an additional delivery point and was requested to be effective as of May 1, 1946, was permitted to be effective as of May 1, 1946; that supplement No. 4 covering an amendment for domestic rates and supplement No. 5 an amendment for industrial rates were requested to be effective as of May 10, 1946, and that they were permitted to become effective May 10, 1946, by the terms of an order dated November 5, 1946, copy of which is marked Exhibit "D" attached hereto and hereof made a part.

Answering Part B, defendant admits that the rates specified in supplements 4 and 5 above were put into effect in accordance with the permission of the Federal Power Commission, but does not know as to when Tyler Gas put into effect its franchise rates, admitting that it did put the same into effect, and leaves proof of the date to Plaintiffs.

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It denies the last sentence of Paragraph B as written and says that its rates contained in supplements 4 and 5 above

described after they were permitted to become effective by the Federal Power Commission were recognized and observed as required by the Natural Gas Act and the Rules and Regulations of the Federal Power Commission to be the authorized, valid and lawful rates to be charged Plaintiff Tyler Gas Service Company and by it paid until the filing of the conversion tariff, after which the rates therein contained became and were the valid, authorized and lawful rates to be charged.

12.

Answering Section IX, it admits that an increase equal to the gathering tax levied by House Bill 285 was made to the rates and charges, but the other allegations in Section IX are denied. Defendant shows that the provisions of supplements 4 and 5 above described were superseded by the conversion tariff filed in accordance with the requirements of the Rules and Regulations of the Federal Power Commission, and that since August 3, 1952 the only lawful and proper and effective rates charged to Plaintiff Tyler Gas Service Company by Defendant have been those in accordance with the so-called conversion tariff approved and permitted to be filed and effective as of August 3, 1952, by order of the Federal Power Commission dated July 31, 1952, a copy of which is marked Exhibit "B" and attached hereto.

13.

Answering Section X:

Defendant admits that on or about July 3, 1952, it filed a conversion tariff in accordance with the Rules and Regulations of the Federal Power Commission which resulted

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in certain changes both in domestic and industrial rates to be charged by Defendant to Tyler Gas Service Company,

though it admits that such changes did not materially or substantially change or affect the total monies paid by Plaintiff Tyler Gas Service Company for the natural gas sold it for the various classes of service rendered by Defendant to the Plaintiff Tyler Gas Service Company, and further admits that said rates were different in several particulars from the provisions of supplements 4 and 5 to the original contract above described; that thereafter and upon due notice thereof by the Federal Power Commission Plaintiff Tyler Gas Service Company filed with the Federal Power Commission certain objections dated July 16, 1952, a copy of which are marked Exhibit "A" and attached hereto, for the purpose of showing that the objections made and filed by the Plaintiff Tyler Gas Service Company was similar if not identical with the matters now sought to be alleged in the bill of complaint as a basis for injunctory relief; that upon consideration of these by the Federal Power Commission they were in all things denied, rejected and overruled by the order of that Commission dated July 31, 1952, a copy of which is marked Exhibit "B" and attached hereto; Defendant denies that the Plaintiff Tyler Gas Service Company did not acquiesce, accept or consent thereto, and says that the terms of the order of July 31, 1952 are binding and conclusive upon it and that it had only two alternatives—to accept and be bound and governed by the same if it wished to continue to receive services permitted by the Rules and Regulations of the Federal Power Commission, or if it felt itself a party

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aggrieved within the terms and provisions of Section 19(b) of the Natural Gas Act their appeal for judicial review, which latter course it did not pursue, whereby said order is res judicata upon all of the matters and issues herein sought to be raised, and that the rates contained in the conversion tariff have been since August 3, 1952, and until

they are superseded by rates which will become effective on December 25, 1953, in Docket G-2210, the only lawful and valid rates.

14.

Answering part A of Section XI, defendant admits that it did on or about June 24, 1953, file an application for increase of rates pursuant to the provisions of Section 4(e) of the Natural Gas Act, which has been docketed by the Federal Power Commission on its docket as Docket G-2210, to which Docket the Plaintiff Tyler Gas Service Company is a party by intervention, and has actively appeared and is actively participating in the trial and hearing thereon, and it denies that the same is in any manner contrary to any term or provision of any contractual obligation which it has with said Plaintiff, and denies that it can have any contractual obligation which would in any manner interfere with or prevent or obstruct the full and unconditional right and freedom to perform and obey and comply with the rights, powers, duties and obligations cast upon it as a natural gas company by the Natural Gas Act, or required of it under the valid power of that Act as administered by the Federal Power Commission. All other allegations in part A are denied.

Answering part B of Section XI, defendant admits that the Plaintiffs objected to the increase of rates applied for in Docket G-2210. Defendant further admits that the Plaintiff Tyler Gas Service Company did request that it not put into effect the new rates under Section 4(e), to which request Defendant could not accede for all of the reasons more particularly set forth in a letter from Defendant through its attorney to the attorney of record for Tyler Gas Service Company dated the 21st day of Novem-

ber, 1953, a copy of which is marked Exhibit "E", attached hereto and made a part hereof.

15.

All of the allegations of part A of Section XII are denied except those which are wholly or partly admitted as follows: The application for increase of rates filed in Docket G-2210 has been in part permitted and allowed to become effective by the Federal Power Commission, and in part the Federal Power Commission is now in full stream of a hearing under the Administrative process to determine whether such application in whole or in part shall be allowed, which hearing is not yet completed.

Both plaintiffs have intervened in said proceeding, have made their appearance by attorneys of record, and have participated in the hearing, and the Plaintiff Tyler Gas Service Company has raised there all issues it seeks to raise in this proceeding. This Court will take judicial cognizance of the method of procedure followed by the Federal Power Commission, pursuant to which it is shown that in accordance with that procedure Defendant has completed its direct case and in accordance with the custom, procedure, rules and regulations of the Federal Power Commission the hearing has been

recessed for all parties to prepare for cross-examination and to prepare to offer such evidence as any of them may want to offer, and the hearing will be resumed upon issuance of order by the Federal Power Commission, and neither Defendant nor Plaintiffs have any way of knowing when or how soon said hearing may be resumed, that depending upon the orders of that Commission. Defendant not only denies, but says that there can be no basis for the allegation that "it is not contemplated" that hearings will

be "resumed in the near future", or that it may "be reasonably anticipated that several months may elapse" before resumption, but Defendant shows that the matter is wholly intimate to the Federal Power Commission.

The allegations of part B of Section XII are denied because the allegations are contrary to the plain purport of Section 4 of the Natural Gas Act by which the Federal Power Commission upon the filing of this application on June 25, 1953, pursuant to that section for an increase of rates in its discretion was given the following options:

(a) The Act requires that applications for increases or changes in schedules of rates shall remain on file for thirty days before they can become effective, and upon the expiration of that thirty days the Federal Power Commission then has the discretion:

(1) To permit the increase to become effective without any hearings; or

(2) To permit the increase to become effective but to enter upon a hearing which will ultimately determine the full effectiveness; or

(3) To enter upon a hearing and to suspend the operation of such schedule and defer the use of such rate, but not for a longer period than five months beyond the time when it would otherwise go into effect, provided that such suspension power shall not apply to a service or sale of natural gas for resale for industrial use only, and to make such orders upon the conclusion of the hearing as would be proper.

(b) But if the proceeding has not been concluded at the expiration of the suspension period, on motion of the natural gas company making the filing the increase rates

shall go into effect, but at that time the Commission may, if it determines, require the natural gas company to furnish a bond to refund with interest any portion of the increased rates or charges which it might find upon the conclusion of the hearing was not justified. It admits that the increased rates for gas sold to Tyler Gas Service Company for resale to McMurray Refining Company were not suspended.

It admits all of part C except the last sentence, and with respect to the last sentence thereof it says that this Honorable Court is without power, authority, or jurisdiction to restrain or enjoin Defendant from complying with Section 4 of the Natural Gas Act for each and all of the reasons hereinabove set out in its motion to jurisdiction above and in its several motions to dismiss for failure to state a claim, all of which are adopted as though set out herein in answer to the last sentence of said part C.

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16.

Answering Section XIII, Defendant denies that it is not abiding by the terms of any existing contract with the Plaintiff Tyler Gas Service Company, denies that it has any contract with the Plaintiff City of Tyler, and says that the matters relied on in the bill of complaint as constituting part of said contract with Tyler Gas Service Company or as constituting a contract with Plaintiff City of Tyler are not contracts which the parties were able legally and validly to make, and all of which went out of said contracts in accordance with the terms and requirements of the Natural Gas Act. It admits that the Plaintiff Tyler Gas Service Company has requested that it not put the increased rates into effect in accordance with Section 4(e) of the Natural Gas Act, which request Defendant is not in a position to honor for all of the reasons set forth in a letter written at its request by its attorney

to the attorney for Tyler Gas Service Company on the 21st day of November, 1953, a copy of which is attached hereto marked Exhibit "E".

17.

All of the allegations of Section XIX are denied except that Defendant admits that the contract of November 22, 1940 and supplements 1 to 5, both inclusive, were negotiated and entered into in all good faith and for good and valuable considerations.

Defendant shows that the only portions of said contract and the several supplements above described which are

now permitted by the Federal Power Commission to be in full force and effect are those contained in a statement made pursuant to Section 154.85 of the Federal Power Commission Rules and Regulations, filed as part of and in connection with the conversion tariff, copy of which statement marked Exhibit "F" is hereto attached and hereof made a part, and which statement pursuant to Section 154.85 was approved and permitted to become filed by the order of the Federal Power Commission dated July 31, 1952, copy of which is marked Exhibit "B" attached hereto, since which date as provided by the order of the Federal Power Commission only those parts of said contract and its amendments and supplements as contained in said statement have been and are now applicable as the basis for measurement and determination of the duties and obligations binding upon the parties hereto for service from Defendant as a natural gas company to the Plaintiff Tyler Gas Service Company.

18.

The allegations of Section XX are denied.

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SECOND DEFENSE

Res Judicata

Heretofore on or about 4 July, 1952, Defendant filed its proposed conversion tariff in accordance with the rules and regulations of the Federal Power Commission, and as required by those rules and regulations filed a statement required by Section 154.85 of the Rules and Regulations of the Federal Power Commission as to those portions of the original contract and all amendments and supplements thereto between Plaintiff Tyler Gas Service Company and Defendant which would and could be retained under the provisions of such rules and regulations, copy of which is marked Exhibit "E" and attached hereto; that thereafter and pursuant to due notice Plaintiff

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Tyler Gas Service Company filed its objections thereto to the Federal Power Commission, which objections were dated July 16, 1952, a copy of which marked Exhibit "A" is attached hereto and hereof made a part, which shows that Plaintiff Tyler Gas Service Company raised to the said Commission all of the matters, things, and issues sought to be raised in the bill of complaint herein as grounds and reasons and objections against the said conversion tariff, and seeking to have exonerated as superior thereto and without possibility of change its claims, constructions and interpretations of contract, which claims, constructions and interpretations are advanced and here pressed upon the Court, which were each and all by the Federal Power Commission denied, rejected and refused by order of July 31, 1952, copy of which is marked Exhibit "B" attached hereto, and hereof made a part, by which said conversion tariff was permitted to become effective, whereby said order of the Federal Power Commission is res judicata of all of the matters and issues sought

to be raised in this bill of complaint, and is binding and conclusive upon the parties hereto and upon this Honorable Court.

Further in this connection, Defendant shows that Mobile Gas Service Corporation in Docket No. G-2227 sought to press upon the Federal Power Commission identical matters sought to be pressed by the Tyler Gas Service Company here, the Mobile Company there contending that it had a contract with this Defendant for industrial rate for a particular sale, which contract could not be changed or affected by any rule or regulation or rate making power of

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the Federal Power Commission, and was entitled to be exonerated over and above any right, power or duty of Defendant as a natural gas company or the Federal Power Commission as administrator of the Natural Gas Act to increase the same, but Defendant shows that on December 7, 1953, the Federal Power Commission adhered to its ruling by its order of July 31, 1952, and rejected and dismissed the application and petition of the Mobile Company as presenting no ground of objection to the full and free compliance, performance and right to comply on the part of Defendant as a natural gas company and the Commission as the administrator of the Natural Gas Act with the terms and provisions of said Act.

THIRD DEFENSE

19.

Defendant says that since the effective date of application of the Natural Gas Act it, as a natural gas company, has been and is without any right, power or capacity at the law to make any valid or enforceable contract, agreement or stipulation which would in any manner interfere with,

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prevent, destroy or be superior to its right and duty as a natural gas company to comply with and to be free to initiate and proceed to completion any and all rights, powers and duties granted and imposed upon it by the terms of said Act, nor has it been nor is it now free to make any contract which would have effect in any manner to interfere with or prevent the Federal Power Commission as administrator

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of the Natural Gas Act, from receiving and entertaining any application permitted, authorized and directed to be filed by any natural gas company, or from considering and disposing of any such application, or from in any manner fixing and regulating rates, which is the heart of the powers conferred upon it by the Natural Gas Act. In respect of contracts made and executed prior to the enactment and effective date of the Natural Gas Act, Defendant shows that such terms and provisions became wholly inoperative upon the effective date of said Act; and that since the date of the enactment of said Act any such provisions were sterile and without any vitality or force ab initio.

Further in this connection, the provisions relied upon by the Plaintiffs herein to the effect that there is some character of an agreement on the part of Defendant that the rates should be maximum rates and that the rates should never be increased are not contained in any contract between Defendant and the Plaintiff Tyler Gas Service Company, were never purported or in fact presented to or brought to the attention of or filed with the Federal Power Commission and therefore were never accepted by that Commission in any sense, or ever permitted to become effective; that in fact no such provisions exist in any instrument between Defendant and the Plaintiff Tyler Gas Service Company respecting any service to be ren-

dered by Defendant to the said Plaintiff, and that provisions to that effect contained in a franchise issued by the Plaintiff City of Tyler to the Plaintiff Tyler Gas Service Company are not binding upon or obligatory to this Defendant; and that any such provisions

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con ained in any letter from this Defendant to the Plaintiff City of Tyler are not a part of any contract, are not a part of the contract between this Defendant and the Plaintiff Tyler Gas Service Company covering and respecting rates, terms and conditions of service, and are in no sense binding upon this Defendant.

FOURTH DEFENSE

20.

Defendant shows that the letter of R. H. Hargrove to the City Commission of the City of Tyler which is dated April 3, 1946 and attached as Exhibit "E" to Plaintiffs' complaint, is not the part of any contract for service between this Defendant and the City of Tyler, that this Defendant does not sell and deliver to the City of Tyler any gas; that no consideration or thing of value moved or does move from the City of Tyler to this Defendant and that said letter, which is not a part of a contract, is wholly without consideration; furthermore that the City of Tyler is wholly without power at the law to make any such contract it not being thereto authorized by its Charter.

WHEREFORE, PREMISES CONSIDERED, Defendant prays judgment of the Court of its motions to the jurisdiction, its motion to dismiss for failure to state a claim upon which relief can be granted, and its motion for lack of capacity of the Plaintiff City of Tyler to maintain this cause, and that each and all of said motions be sustained and that this

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cause be dismissed, and subject thereto and only in the event said motions be denied, then Defendant prays that upon hearing hereof the injunction

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sought be in all things denied; that the Plaintiffs take nothing by reason of their suit against this Defendant, and that this Defendant go hence without day, for all costs, and for such other orders, both special and general, at law and in equity, which the Court may deem just and proper.

THOMAS FLETCHER

Thomas Fletcher
11th Floor Esperson Building
Houston 2, Texas.

JAMES W. McCARTNEY
11th Floor Esperson Building
Houston 2, Texas.

Attorneys for Defendant
United Gas Pipe Line Company.

Of Counsel:

VINSON, ELKINS, WEEMS & SEARLS
11th Floor Esperson Building
Houston 2, Texas.
Attorneys for Defendant
United Gas Pipe Line Company

STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared THOMAS FLETCHER, who being by me duly sworn states on his oath that he is attorney of record for United Gas Pipe Line Company, and by said

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Company duly authorized and empowered for and on its behalf and in its name to execute this verification to the above and foregoing answer, that all matters of fact therein stated are true and correct, and affiant verily believes them to be true and correct.

THOMAS FLETCHER

SWORN TO AND SUBSCRIBED before me this the 11th day of December, 1953.

ELIZABETH COGHLAN
Notary Public in and for
Harris County, Texas.

(SEAL)

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TYLER GAS SERVICE COMPANY
TYLER, TEXAS

Federal Power Commission
Washington 25, D. C.

Ref: United Gas Pipe Line Company—Rate Increase Application Proposed as covered in your letter of July 8, 1952

Gentlemen:

The undersigned, Tyler Gas Service Company (Tyler) of Tyler, Texas, acknowledges receipt of your letter dated July 8, 1952, advising of the filing with you by United Gas Pipe Line Company (United) of an application for increases in its rates for the sale in interstate commerce of natural gas for resale, which proposed increases would affect the undersigned.

We object to the proposed increases in rates, in so far as the same apply to the sale of natural gas to us, for the reasons hereinafter set forth.

I

The Proposed Increases Would Violate the Terms of the Existing Contract Between the Undersigned and United

As disclosed by documents on file with the Commission, there is in existence a gas sales agreement between United and Tyler, dated November 22, 1940, as amended and supplemented, which requires United to sell and deliver natural gas to Tyler at Tyler, Texas, for a term beginning November 5, 1940 and ended July 25, 1962, at prices fixed by a supplemental agreement between said parties, dated May 29, 1946, which are not subject to change during the remainder of the term of said agreement except as a result of increases in taxes (as therein defined) subsequent to May 10, 1946. Adjustments in such rates because of increases in taxes have heretofore been made, but with that exception all of the rates fixed by said supplemental agreement of May 29, 1946, have been and now remain in full force and effect.

There is no provision in said gas purchase agreement, as amended and supplemented, which permits United to increase its rates to Tyler, except with respect to increased taxes as aforesaid; and the proposed increases requested by United in its application filed with the Commission, being without the consent or agreement of Tyler, would violate the terms of said gas purchase agreement. We respectfully submit that an order of the Commission approving the requested increases in rates would in effect abrogate a valid existing contract between United and Tyler.

Furthermore, the F. P. C. Gas Tariff, original Volume No. 1, filed by United with the Commission contains, in addition to the rate increases above mentioned, various terms and conditions which are inconsistent with the provisions of said gas purchase agreement between United and Tyler; and if said tariff is

made effective by order of the Commission the effect would be to abrogate the existing contract between the parties to the extent of such inconsistencies.

II

Approval of the Proposed Tariff and the Proposed Increases in Rates Would Result in Irreparable Damage to Tyler

On or about April 5, 1946, by an ordinance of its City Commission, the City of Tyler granted to Tyler a franchise authorizing it to use the streets, alleys, and other public places in the City of Tyler in the purchase, sale, supply, and distribution to the City and inhabitants thereof of natural gas, in and by which franchise the rates which Tyler is permitted to charge for gas distributed and sold in the City of Tyler were fixed in accordance with a schedule of rates therein referred to. Said franchise was accepted by Tyler on or about May 20, 1946. A copy of said ordinance is enclosed.

The rates provided in said schedule of rates were based upon and accepted by Tyler in reliance upon the unqualified undertaking of United to supply Tyler with natural gas on the terms and at the rates prescribed in said gas purchase agreement, as amended and supplemented, and particularly as supplemented by said supplemental agreement dated May 29, 1946. The term of said franchise was fixed to expire at or about the date of expiration of said gas purchase agreement, viz, July 25, 1962.

Assuming that Tyler might apply to the City for an increase in rates and that it would be within the power of the City to grant an increase, there is, nevertheless, no assurance that any such increase would be granted, even though the rates for the gas to be purchased by Tyler from United are increased to a point that would make it impossible for

Tyler to operate except at a loss or at a margin of profit that would not yield a fair return. The result is that if the proposed rate increases and the tariff filed by United are approved by order of the Commission, Tyler will suffer an irreparable loss. Even if a rate increase should be granted by the City, there would necessarily be a substantial time lag between the effective date of the proposed rate increases requested by United and the effective date of any such increase that might be granted by the City, with resulting irreparable loss to Tyler.

III

The Commission Lacks Jurisdiction to Order the Proposed Rate Increases

The undersigned is informed and believes that all of the natural gas sold by United to Tyler is produced, gathered, transported and sold solely within the State of Texas, and by reason thereof and by virtue of the terms of the Natural Gas Act the Federal Power Commission is without jurisdiction to entertain the application of United in so far as it relates to the terms, conditions and rates applicable to sales of natural gas to Tyler, and without power to approve or order changes in any such terms, conditions or rates.

Request for Hearing

The undersigned respectfully requests that the application of United

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be set down for hearing, at which hearing the undersigned may have the opportunity of presenting evidence in support of its objections.

A copy of this letter is being forwarded to United.

Respectfully submitted,

TYLER GAS SERVICE COMPANY
By J. W. HICKMAN
President

Dated July 16, 1952.

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United States of America
Federal Power Commission

Before Thomas C. Buchanan, Chairman; Dale E. Doty and Harrington Wimberly, Commissioners.

July 31, 1952

Docket No. G-2019

In the Matter of:

United Gas Pipe Line Company.

Order Allowing Conversion Tariff to Become effective, in part, Suspending Conversion Tariff, in part, and Suspending Notices of Cancellation.

On July 3, 1952, United Gas Pipe Line Company (United) filed its proposed conversion tariff, which, unless suspended, will become effective August 3, 1952, and will result in an increase of approximately $9,500,000 to five natural-gas pipe-line companies, based upon United's estimated sales for the twelve-month period ending April 30, 1953. The proposed conversion tariff is designated United Gas Pipe Line Company's FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2.

Concurrently with its filing of July 3, 1952, and subsequently on July 11, 1952, United submitted proposed notices of cancellation of rate schedules on file with the Commission covering, in whole or in part, sales of natural gas which United alleges are no longer in interstate commerce and subject to the jurisdiction of the Commission, or have never been subject to the jurisdiction of the Commission because they do not involve sales of gas in interstate commerce. The proposed notices of cancellation are set forth in Appendix A hereof.

Included in the proposed notices of cancellation is a notice of cancellation purporting to cancel, in part, Rate

Schedule FPC No. 73, which covers the sale of natural gas by United to Willmut Gas & Oil Company (Willmut), a distributor of natural gas in Mississippi. Willmut objects to such proposed cancellation asserting that the question of the jurisdiction of the Commission over all of United's sales to Willmut are at issue in the complaint proceeding entitled In the Matter of Willmut Gas & Oil Company, et al. v. United Gas Pipe Line Company at Docket No. F-1158, in which proceeding hearings have been held, briefs have been filed, and the matter is now pending before the Presiding Examiner for initial decision.

By its proposed conversion tariff and proposed notices of cancellation United proposes to supersede all of the rate schedules it has on file with the Commission.

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The principal changes which would be effected by the proposed conversion tariff for city-gate sales are the establishment of specific rates for industrial gas in lieu of the existing revenue-sharing arrangements, a changeover from all-requirement service to specific volumetric obligations upon execution of new service agreements, the elimination of tax adjustment clauses and provisions relating to negotiation of changes in rates, standardization of measurement bases and billing practices, and minimum heat content guarantee.

The proposed conversion tariff respecting sales to and services for United's pipe-line customers involves (a) restatements of two rate schedules as Rate Schedules PL-1 and PL-2 without change, (b) proposed substantial increases in rates for other sales under the conversion tariff Rate Schedule PL-3, and (c) proposed substantial increases in rates for transportation services under the conversion tariff Rate Schedules T-1, T-2, and T-3. The increases in rates approximate $9,500,000 under the pro-

posed conversion tariff Rate Schedules PL-3, T-1, T-2, and T-3.

United also requests permission, pursuant to Section 154.52 of the Regulations under the Natural Gas Act (18 CFR 154.52), to file the transportation contract with Mississippi River Fuel Corporation and three exchange service arrangements, now rendered under letter agreements, as special rate schedules to be contained in Original Volume No. 2. No changes are proposed in these arrangements.

In addition, United filed, pursuant to Section 154.85 of the Regulations under the Natural Gas Act (18 CFR 154.85), statements of the presently effective rate schedules, identifying the contract provisions which are not superseded by or in conflict with other applicable provisions of the rate schedules and the General Terms and Conditions of the proposed tariff and which are to remain in effect.

United asserts that increased rates are necessary because of the impact of the general trend of increasing costs, including the cost of purchased gas, the Texas gas gathering tax, proposed payroll increases, and pension costs for past service benefits.

In addition to adjustments to book costs for the foregoing, United's claimed costs of service are premised on a rate base including the total amounts in its Gas Plant Acquisition Adjustment account which, in whole or in part, may be improper for this purpose; and amounts for working capital which have been computed without regard to the availability of Federal and other tax accruals for such purpose. United also claims a rate of return of 6½% without submitting financial facts in support thereof, income taxes associated with such rate of return, and the expense of amortizing the total amounts in the aforesaid Gas Plant Acquisition Adjustment account on an accelerated basis.

It appears, therefore, that for these reasons, among others, the proposed increase in rates and charges as contained in proposed Rate Schedules PL-3, T-1, T-2, and T-3 and changes in conversion tariff provisions relating thereto may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful, and may place an undue burden upon ultimate consumers of natural gas.

All of United's customers, as well as interested regulatory agencies, were invited to submit comments with respect to the application for the proposed changes in rates. Comments have been received from the five pipe-line customers, seven city-gate customers, and two State commissions. Generally, the customers and State commissions object to the proposed increase, or assert they are unable to determine that the proposed increase is justified, or request that the Commission suspend the proposed conversion tariff.

The Commission finds:

(1) It is necessary or appropriate to carry out the provisions of the Natural Gas Act and to aid in the enforcement thereof in the public interest, that the Commission enter upon a hearing pursuant to the authority contained in Section 4(e) thereof, concerning the lawfulness of the proposed rates, charges, classifications or services contained in Rate Schedules PL-3, T-1, T-2, and T-3 as set forth in United's proposed conversion tariff together with the applicable General Terms and Conditions and pre-existing contract statements pertinent thereto; and concerning the lawfulness of the proposed notices of cancellation listed in Appendix A hereof and, pending hearing and decision thereon, that the operation of United's proposed Rate Schedules: PL-3, T-1, T-2, and T-3 together with the applicable General Terms and Conditions and pre-existing

contract statements pertinent thereto; and United's proposed notices of cancellation as set forth in Appendix A hereof be suspended and the use thereof deferred as provided by the Natural Gas Act. In all other respects it is appropriate to permit United's FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, to become effective as of August 3, 1952.

(2) Good cause has been shown to permit the filing of the special operating arrangements set forth in Original Volume No. 2 as special rate schedules pursuant to the provisions of Section 154.52 of the Commission's Regulations under the Natural Gas Act.

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The Commission orders:

(A) Pursuant to the authority contained in Section 4 of the Natural Gas Act, a public hearing be held at a time and place and at a date to be fixed by further order of the Commission concerning the lawfulness of the rates, charges, classifications or services, subject to the jurisdiction of the Commission, as set forth in proposed Rate Schedules PL-3, T-1, T-2, and T-3 of United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto; and concerning the lawfulness of the proposed notices of cancellation set forth in Appendix A hereof.

(B) Pending such hearing and decision thereon, United Gas Pipe Line Company's proposed Rate Schedules PL-3, T-1, T-2, and T-3 as set forth in United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1, including the applicable General Terms and Conditions together with the pre-existing contract statements

pertinent thereto; and United Gas Pipe Line Company's proposed notices of cancellation set forth in Appendix A hereof, be and the same are hereby suspended and their use deferred until January 3, 1953, and until such further time as such proposed rate schedules, applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, and proposed notices of cancellation may be made effective in the manner prescribed by the Natural Gas Act.

(C) In all other respects, United Gas Pipe Line Company's proposed FPC Gas Tariff, Original Volume No. 1 and Original Volume No. 2, including the applicable General Terms and Conditions together with the pre-existing contract statements pertinent thereto, be and they are hereby allowed to become effective as of August 3, 1952.

(D) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, particularly subsections (b) and (c) thereof; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such services or rates provided for in the above-described tariff, the applicable General Terms and Conditions together with pre-existing contract statements

pertinent thereto; nor shall it be deemed as recognition of any claimed contractual right or obligation affecting or relating to such services or rates.

(E) This order is without prejudice to any findings or orders which have been or may hereafter be made by this Commission in Docket No. G-1142, Docket No. G-1158, and in any proceeding now pending, or hereafter instituted, by or against United Gas Pipe Line Company.

(F) Interested State commissions may participate as provided by Sections 1.8 and 1.37(f) (18 CFR 1.37 (f)) of the Commission's Rules of Practice and Procedure.

(G) The effective date of this order shall be July 31, 1952.

By the Commission.

LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

Date of Issuance: August 1, 1952.

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EX. C.

United States of America

Federal Power Commission.

Before Commissioners: Jerome K. Kuykendall, Chairman; Dale E. Doty, Claude L. Draper and Nelson Lee Smith.

Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210.

In the Matters of:

United Gas Pipe Line Company.

Order Suspending Proposed Rate Schedules, Permitting Proposed Rate Schedules to Become Effective on Thirty Days' Notice Pending Hearing, Consolidating Proceedings, and Fixing Date of Hearing.

On June 24, 1953, United Gas Pipe Line Company (United) tendered for filing its First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120 and Second Revised Sheets Nos. 23, 31 and 39 to its FPC Gas Tariff Original Volume No. 1, containing increased rates and charges for

certain town-border sales, proposed to be made effective as of July 15, 1953.

The increased rates and charges would result in an estimated increase of $1,691,000 per year based on actual sales for the calendar year 1952, or $1,778,000 based on estimated sales for the year 1953, in the rates and charges presently on file with the Commission in United's tariff.

From the data filed by United the increased rates and charges provided in said proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, 120, Second Revised Sheets Nos. 23, 31 and 39 as tendered for filing on June 24, 1953, have not been shown to be justified and may be unjust or unreasonable or otherwise unlawful. By reason of the proviso of Section 4(e) of the Natural Gas Act,[1] however, the proposed increase in rates reflected in First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39, are subject to investigation in these proceedings and such revision as may be appropriate after hearing, but are not subject to suspension. Since good cause has not been shown by United for the requested effective date of July 15, 1953, as required by Section 4(d),

First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 can only be permitted to become effective on July 25, 1953, i.e., upon thirty days' notice as provided in Section 4(d).

The rates and charges proposed to be increased by United are among the rates and charges which are the subject of the consolidated proceedings in In the Matters of United Gas Pipe Line Company, Dockets Nos. G-1142, G-1508, G-2019, and G-2074. These proceedings are in recess until

[1] "Provided, That the Commission shall not have authority to suspend the rate, charge, classification or service for the sale of natural gas for resale for industrial use only."

July 20, 1953, at which time United is to complete its case-in-chief in those proceedings.

The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capital, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Dockets Nos. G-1142, G-1508, G-2019, and G-2074.

It appears appropriate and desirable to consolidate the proposed application filed on June 24, 1953, for an increase in rates with the proceedings in the consolidated Dockets Nos. G-1142, G-1508, G-2019, and G-2074 so that the common issues raised by these various proceedings may be heard together.

By letter of June 26, 1953, customers of United and interested State Commissions were invited to make comments in regard to the rate increase application filed June 24, 1953. Comments were received from the Alabama Public Service Commission, the cities of Tyler, Texas, and Bastrop, Louisiana, and six customers. Generally, objections were made to the proposed rate increase. No comment was received from United Gas Corporation which is the principal town-border customer and the parent company of United.

The Commission finds:

(1) It is necessary and proper in the public interest and to aid in the enforcement of the provisions of the Natural Gas Act and good cause exists for the Commission to enter upon a hearing on July 20, 1953, pursuant to the authority contained in Section 4 of such Act, concerning the lawfulness of United's FPC Gas Tariff, Original Volume No. 3, as proposed to be amended by First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119, and 120 and Second Revised Sheets Nos. 23, 31 and 39 and what said proposed sheets, with the exception of First Revised Sheets Nos. 32 and 40

and Second Revised Sheets Nos. 31 and 39, be suspended as hereinafter provided and the use thereof deferred pending hearing and decision thereon.

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(2) Good cause has not been shown for waiver of the 30 days' notice requirement of Section 4(d) of the Natural Gas Act with respect to First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39.

(3) Good cause exists for further consolidating the proceeding involving the proposed increased rates and charges contained in the proposed First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40, 118, 119 and 120 and Second Revised Sheets Nos. 23, 31 and 39 with the proceedings in consolidated Dockets Nos. G-1142, G-1508, G-2019, and G-2074.

(4) Good cause exists for fixing the date of hearing less than fifteen days after publication of this order in the Federal Register.

(5) It is necessary and appropriate to carry out the provisions of the Natural Gas Act, and it is in the public interest that the procedure hereinafter prescribed shall be followed at the hearing in order to conduct these proceedings with reasonable dispatch.

The Commission orders:

(A) A public hearing be held at 10 a.m. (EDST) on July 20, 1953, in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D. C., concerning the lawfulness of the rates, charges, classifications, and service, subject to the jurisdiction of the Commission, as set forth in United's FPC Gas Tariff, Original Volume No. 1, as proposed to be amended by the revised sheets described in Paragraph (B) hereof.

(B) The proceeding in Docket No. G-2210, involving United's First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 32, 40,

118, 119, and 120 and Second Revised Sheets Nos. 23, 31 and 39, and the proceedings in Dockets Nos. G-1142, G-1508, G-2019, and G-2074 be and they hereby are consolidated for purpose of hearing.

(C) Pending such hearing and decision thereon, United First Revised Sheets Nos. 1, 4, 5, 6, 7, 16, 118, 119 and 120, and Second Revised Sheet No. 23 to its FPC Gas Tariff Original Volume No. 1, be and the same are hereby suspended and the use thereof deferred until December 25, 1953, unless otherwise ordered by the Commission, and until such further time thereafter as said proposed revised sheets may be made effective in the manner prescribed by the Natural Gas Act.

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(D) Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953.

(E) At the hearing United shall go forward first and shall present and complete its case-in-chief with respect to its FPC Gas Tariff, as amended by the revised sheets set forth in Paragraph (B) above, before cross-examination is undertaken of United's presentations in the consolidated proceedings.

(F) Interested State commissions may participate as provided by Section 1.8 and 1.37(f) (18 CFR 1.8 and 1.37(f)) of the Commission's Rules of Practice and Procedure.

By the Commission.

LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

(Seal)

Adopted: July 10, 1953.
Issued: July 10, 1953.

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EX. D.

United States of America,

Federal Power Commission.

Before Commissioners: Leland Olds, Chairman; Claude L. Draper and Harrington Wimberly.

November 5, 1946

In the Matter of:

United Gas Pipe Line Company.

Order Allowing Rate Schedules to Take Effect.

Upon consideration of the contracts filed on August 5, 1946, by United Gas Pipe Line Company, designated by the Commission as Supplements Nos. 3, 4, and 5 to Rate Schedule FPC No. 42, providing for the sale and delivery of natural gas to the Tyler Gas Service Company, and application that Supplement No. 3 be permitted to take effect as of May 1, 1946, and Supplements Nos. 4 and 5 as of May 10, 1946;

The Commission orders that:

(A) The aforesaid rate schedules be and the same hereby are accepted for filing and allowed to take effect as of the dates requested.

(B) The aforesaid rate schedules shall be deemed to be filed and published in compliance with the Natural Gas Act.

(C) Nothing contained in this order shall be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval by this Commission of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such service or rate provided for in the

above-designated rate schedules; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;

(D) This order is without prejudice to any findings or orders which may be made by the Commission in any proceedings now pending, or hereafter instituted, by or against the United Gas Pipe Line Company.

By the Commission.

LEON M. FUQUAY,
(Leon M. Fuquay),
Secretary.

(Seal)

Date of Issuance: November 6, 1946.

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EXHIBIT "E".

Vinson, Elkins, Weems & Searls
Attorneys at Law
Esperson Building
Houston, Texas

November 21, 1953

Mr. Thomas B. Ramey,
Attorney at Law,
Citizens National Bank Building,
Tyler, Texas.

My dear Tom:

Recently you and Mr. Hickman, President of Tyler Gas Service Company, at a conference in Shreveport with United Gas Pipe Line Company relative to its application at Docket G-2210 to the Federal Power Commission for an increase in the authorized rates for city gate sales including the Tyler Gas Company, requested advice whether:

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1. United Gas Pipe Line Company (United) would join the Tyler Gas Service Company (Tyler) in an application to the Federal Power Commission to disclaim or dismiss jurisdiction over the Tyler City gate sale, and

2. Whether United would consent not to put the increased rates into effect on December 2, 1953, as provided by the terms of the Natural Gas Act.

United has earnestly and carefully reviewed and re-examined the entire situation, including its present arrangement governing the city gate sale to Tyler and the provisions of the franchise issued in April of 1946 by the City of Tyler to Tyler Company. It has requested that I communicate to you its promised answer to the requests above quoted.

Investigation confirms that interstate gas is now, and for some time has been, delivered to Tyler. Thus United is unable to join in an application as described in the first request.

The difficulty of the second request is even greater. The time lag caused by preparation of the necessary papers for filing and the five months suspension permitted by the terms of the Natural Gas Act is serious and hurtful. The exigencies of United and the responsibility of its management simply require that the increase in rates be put into effect in accordance with the provisions of the Natural Gas Act. That Act does not contain provisions which authorize putting into effect all of such increased rates except those applicable to Tyler. Aside from the question of authority, to attempt to place in effect all of such increased rates except those applicable to Tyler would probably result in claims of discrimination which would create

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substantial and multiple problems and difficulties.

In the light of this conclusion, consideration was given to the suggestion that the provisions for, and recital of,

rates in the franchise is an agreement conclusive on Tyler against seeking or obtaining a justifiable increase in these rates. United believes, and respectfully submits for your consideration: That the City of Tyler by its charter is empowered and obligated to fix and regulate rates but is not authorized or permitted to make agreements on rates so that franchise provisions respecting rates do not prejudice or preclude Tyler from obtaining any increase it may show to be proper under familiar rate regulatory principles; that attempted contract or franchise provisions having an effect claimed to avoid or defer for the period of the franchise the free exercise of the legislative and governmental function of fixing and regulating rates are ineffectual and without force; that provisions affecting or prejudicing free exercise of the duty to regulate rates are inconsistent with that duty and unenforceable.

For all of the foregoing reasons, United regrets that it cannot accede to your requests. United hopes that upon further consideration you will find yourself in agreement with its views, and that no disagreement will arise to mar the cordial relations it has enjoyed with Tyler.

With warmest personal regards and best wishes, I am,

Cordially yours,

THOMAS FLETCHER.

CC: United Gas Pipe Line Company
Shreveport, Louisiana

16-22a

(Copy.)

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EX. F.

May 29, 1952

Reference F.P.C. Rate Schedule No. 42.

United Gas Pipe Line Company.

This statement is made pursuant to Section 154.85 of Federal Power Commission Rules and Regulations with reference to the existing Gas Sales Agreement between United Gas Pipe Line Company and Tyler Gas Service Company, or their predecessors in title, dated November 22, 1940, as amended and supplemented.

This Contract, as amended and supplemented, continues in effect as an executed Service Agreement for service to the extent that the provisions thereof are not superseded by or inconsistent with the applicable provisions of the Rate Schedules and General Terms and Conditions of United Gas Pipe Line Company's Federal Power Commission Gas Tariff.

The following provisions of said Contract, and amendments and supplements thereto (herein identified by F.P.C. Supplement Number to the above numbered Rate Schedule) remain in effect and have not been superseded by said Gas Tariff:

	Part Retained
Preamble	All
Article I	All
Article II, as amended by Supplement No. 3	All of Article II and paragraph numbered "1" of Supplement No. 3
Article III	All
Article VI	All
Article X	All

Article XIV	All
Article XV	Last-paragraph
Article XVI	1st sentence except words "check meters"
Article XVII	All
Article XX	All
Article XXI	All
Article XXIII	All
Testimonium Clause and Signatures	All
Supplements:	
Supplement No. 3	Paragraph numbered "4"

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Docket Nos. G-1142, G-2210, G-9547 and G-10592

In the Matters of

United Gas Pipe Line Company

Opinion No. 294

Opinion and Order Denying Motion for Refund and Denying Petitions for Rejection of Rate Filings

(Issued October 2, 1956)

These are rate proceedings involving the rates charged by United Gas Pipe Line Company (United) to Tyler Gas Service Company (Tyler Gas) for natural-gas service rendered to it. The proceedings arise from the rate increase proposals filed with the Commission. Specifically, they pertain to a motion filed on May 15, 1956, by Tyler

Gas to require United to refund certain moneys collected pursuant to an undertaking to refund in Docket No. G-2210 and joint petitions filed on October 21, 1955, in Docket No. G-9547 and on June 15, 1956, in Docket No. G-10592 by Tyler Gas and the City of Tyler, Texas, seeking rejection of rate increase filings of United in those dockets. United opposes the requests of Tyler Gas and the City of Tyler. Since the motion and the two petitions raise the same issue of the Commission's power under the Natural Gas Act (Act), we heard oral argument on all three together on July 13, 1956.

The motion and the joint petitions raise the primary question of the Commission's power to entertain the rate increase proposals filed by United in the three dockets without the consent of Tyler Gas. United defends the assertion of Commission power to accept the filing of changes in tariff rates and, in addition, in opposition to the motion for refunds, claims that the decision of the Court of Appeals for the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, 217 F. 2d 73, bars Commission action granting refunds in Docket No. G-2210. We have carefully examined the contentions of the parties, including the argument by Tyler Gas and the City of Tyler that the decision of the United States Supreme Court in the *Mobile* case[1] requires us to take the action requested by them. We conclude that none of the filings in Docket Nos. G-2210,

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G-9547 or G-10592 is governed by the *Mobile* case; that the *ex parte* filings of tariff rates by United were properly made in pursuance to the Commission's regulations and the provisions of the Natural Gas Act; and that the motion and the joint petitions must be denied. Additionally, with

[1] *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332.

respect to the motion for refunds in Docket No. G-2210, we conclude that the decision of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court constitutes a bar to relitigation of the issues which were raised, or might have been raised, by Tyler Gas in that proceeding.

A brief resume of the history of the rate proceedings involving Tyler Gas and United will aid in understanding our decision herein. The original contract between United and Tyler Gas, entered into on November 22, 1940, provided for a rate of 22.5¢ per Mcf for gas to be resold for domestic use. For gas to be resold for industrial use only United received 80% of the proceeds received by Tyler Gas from the industrial sales, but not less than 16¢ per Mcf. In accordance with the Commission's General Rules and Regulations effective at that time, the contract was filed by United on January 3, 1941, and by order of February 12, 1941, the Commission permitted the contract to become effective as United's FPC Gas Rate Schedule No. 42.

Service was rendered under this contract, with amendments not significant here, until 1946 when, pursuant to agreement between the parties, the contract was revised to provide for a substantial reduction in rates. Under the amended contract, filed as Supplements Nos. 3 and 4 to United's FPC Gas Rate Schedule No. 42 and effective as of May 10, 1946, the rate for resale for domestic use was reduced to 12¢ per Mcf and the rate for resale for industrial use only, stated in terms of 80% of the proceeds received by Tyler Gas for those sales, was likewise reduced so that the minimum to be received by United was 7.2¢ per Mcf. The term of the amended contract was 16 years.

From May 10, 1946, until August 3, 1952, United rendered service to Tyler Gas pursuant to the amended con-

tract. On July 3, 1952, United filed its proposed conversion tariff, submitted in compliance with the Commission's Order No. 144, Docket No. R-107. Among other things, the conversion tariff (United's FPC Gas Tariff, Original Volume No. 1) which became effective for service rendered to Tyler Gas on August 3, 1952, changed the rates for the sale of gas to Tyler Gas. The rate for resale for domestic use was reduced to 11.2¢ and the minimum rate for resale for industrial use only was increased to 7.5¢. In over-all effect the dollar amount paid by Tyler Gas to United was increased approximately $7,900 annually. Tyler Gas filed a letter protesting the filing. However, Tyler Gas did not petition to intervene in the proceeding nor seek review of the Commission's order permitting the conversion tariff to become effective as to sales to Tyler Gas. Hence, the order became final and binding upon Tyler Gas.

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At this point the purpose and effect of the conversion tariff should be made clear. In issuing Order No. 144 in Docket No. R-107 on October 30, 1948, we required all natural-gas companies to convert their contracts filed as rate schedules into tariff form. We recognized that prior to the passage of the Natural Gas Act natural-gas companies had no rate schedules generally applicable to stated classes of service. The prevailing practice was to sell natural gas under individual contracts arrived at after extensive negotiations between the parties. These contracts varied greatly in form and content but to expedite the establishment of legal rates at the inception of regulation under the Natural Gas Act we permitted natural-gas companies to file their contracts as rate schedules. Amendments to the rate contracts filed as supplements to the rate schedules complicated matters further.

Prior to World War II we undertook to revise this cumbersome method of filing which resulted not only in administrative inefficiency but also in possible discrimination among customers. However, before we could institute a uniform procedure, the war and consequent lack of manpower intervened. Later, through informal cooperation between many natural-gas companies and the Commission's Staff, whereby the natural-gas companies converted from contract to tariff rates, the efficacy of the tariff procedure was proven. Therefore, we issued our Order No. 144 revising our General Rules and Regulations to require the filing of tariffs in place of the myriad of contracts on file as rate schedules.

An FPC gas tariff filed in pursuance to Order No. 144 contains in one volume all information pertinent to jurisdictional service rendered by the natural-gas company. First, there are set forth the rate schedules for all classes of service (an index of purchasers identifying the rate schedules under which each buys gas is contained at the end of the volume). Following the rate schedules are the General Terms and Conditions which make uniform for all service rendered by the natural-gas company such provisions as the definition of terms, the quality and measurement of gas to be delivered, billing, payments, and delivery pressures. Also included within the tariff is the form service agreement to be executed by the natural-gas company and the purchasing companies. With such a tariff, all conditions of service, including the rates, can be readily ascertained for all purchasers from one natural-gas company.

Absent the execution of the form service agreement by the natural-gas company and a purchaser, Section 154.85 of the Commission's Regulations, made effective through Order No. 144, provides that "each contract, which is now filed as an effective rate schedule, may be continued in

effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff."

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When United filed its conversion tariff on July 3, 1952, its contract with Tyler Gas remained in effect as an executed service agreement pursuant to the terms of the above-quoted regulation. Inserted in the front of the pre-existing contract there is a statement identifying the contract provisions remaining in effect and those which were superseded by the conversion tariff. This pre-existing contract statement shows that the rate terms of the contract, among other terms such as measurement of the gas, were superseded and no longer remain in effect.

By order issued July 30, 1952, the Commission accepted this revision in the course of business proposed by United and accepted by Tyler Gas, and the conversion tariff became effective as of August 3, 1952. Although Tyler Gas did file a letter of protest to the conversion tariff it did not seek review of the order permitting it to become effective and in its motion for refunds in Docket No. G-2210 asks to be returned to the tariff rates contained in the conversion tariff. It is clear, therefore, that we are not here concerned, either in the motion for refunds or in the joint petitions for rejection, with contract rates. We are here dealing with tariff rates, filed *ex parte* by United, as revised by new tariffs rates also filed *ex parte* by United.

Service was rendered pursuant to the conversion tariff rates until United filed a proposed *ex parte* change in the tariff rates to Tyler Gas in Docket No. G-2210 on June 24,

1953. By order issued July 10, 1953, we permitted the rate for resale for industrial use only to take effect on July 25, 1953, subject to final determination in the proceedings as to its future effect but we suspended the rate for resale for domestic use until December 25, 1953, when it could be made effective on motion of United. This *ex parte* filing provided for rates of 20¢ per Mcf for the first block and 12.5¢ per Mcf for the second block for gas resold for domestic use and 13¢ per Mcf for gas resold, for industrial use only, an overall increase in rates of approximataly 70%. Tyler Gas objected to the proposed increase and filed a petition to intervene in the proceeding.[2]

Initial hearings on the matters involved in Docket No. G-2210 were held on July 20, 1953, but were not completed before the end of the suspension period when United could move to put the rates into effect, subject to refund, in accordance with Section 4 (e) of the Act. In order to forestall the new tariff rates for resale for domestic use from going into effect subject to refund as of December 25, 1953, Tyler Gas filed a petition for injunction in the U. S. District Court for the Eastern District of Texas, Tyler Division, seeking to enjoin United from moving to put the rates into effect. The District Court denied the injunction for

failure to show grounds for equitable relief (Civil No. 1662 issued January 26, 1954). Upon appeal by Tyler Gas the lower court was affirmed by the Court of Appeals for the Fifth Circuit. *Tyler Gas Service Company, et al. v. United Gas Pipe Line Company*, 217 F. 2d 73. When

[2] The July 10, 1953 order consolidated the rate increase proceeding in Docket No. G-2210 with other proceedings involving the rates of United, including Docket No. G-1142 which involved a Section 5 (a) investigation, into the entire rate structure of United.

Tyler Gas did not seek *certiorari* the decision of the Fifth Circuit became final and binding upon it. Meanwhile, pursuant to our order issued January 25, 1954, the increased rates for sale of gas to Tyler Gas for resale for domestic use went into effect, subject to refund, as of December 25, 1953.

In our Opinion No. 277 issued on November 2, 1954, in Docket Nos. G-1142, G-2210, *et al.*, we determined the just and reasonable rates to be charged by United to its jurisdictional customers.[3] Tyler Gas did not contest the rate level found to be just and reasonable and, with the City of Tyler, stated on the record its acceptance of the terms of the proposed settlement subject to the outcome of the litigation then pending before the United States Court of Appeals for the Fifth Circuit. We disallowed and denied the rate increases proposed by the *ex parte* filing of United in Docket No. G-2210 and directed the filing of new rates, to be effective as of August 1, 1954, in conformity with our findings and the settlement agreement among the parties. However, because of the pendency of the appeal by Tyler (the Court of Appeals issued its decision in the *Tyler Gas* case on November 24, 1954) we provided that the proceedings in Docket No. G-2210 should remain open for a determination of the issues raised by Tyler Gas and the City of Tyler and the rates to Tyler Gas continued subject to refund. To protect Tyler Gas from paying more than the lawful rate pending the court decision, we stayed our order in Docket No. G-2210 to the extent Tyler Gas would be required to pay more than the settlement rates applicable to it. From the date the decision of the Court of Appeals became final, the contingency provided for in Opinion No. 277 having been satisfied, the settlement rates

[3] Opinion No. 277 accepted a settlement agreement among the parties to the proceeding as being appropriate and in the public interest.

became applicable to United's sales to Tyler Gas.[4] It is clear, therefore, that Tyler Gas was fully protected from paying more than the lawful rate pending our determination.

Tyler Gas argues that it is entitled to refunds of all amounts collected by United in excess of the conversion tariff rate for resale for domestic use of 11.2¢.[5] It seeks this result regardless of the determination of the lawful rates in Opinion No. 277. It bases its argument

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upon the holding of the Supreme Court in the *Mobile* case which was handed down subsequent to the decision of the Court of Appeals for the Fifth Circuit in the *Tyler Gas* case. But the *Mobile* case is distinguishable from the situation involved here either in Docket No. G-2210 or in the two later rate increase proceedings in Docket Nos. G-9547 and G-10592.

The *Mobile* case involved a contract rate for resale for industrial use only which United attempted to set aside by its unilateral filing. Pursuant to Section 4 (e) the rate increase was not suspended or made effective subject to refund. The Supreme Court held that a natural-gas company cannot, by a unilateral filing under Section 4 of the Act, effect a change in a contract rate. With respect to Mobile, United had filed its conversion tariff but, unlike the departure from the contract rates to Tyler Gas effected by the conversion tariff, the conversion tariff did not

[4] Pursuant to Opinion No. 277 the rates to Tyler Gas, effective as of August 1, 1954, were 17¢ per Mcf for the first block and 12.5¢ per Mcf for the second block for gas resold for domestic use. For gas resold for industrial use the rate was 12.5¢ per Mcf.

[5] Tyler Gas does not ask for restitution of the increase in the rate for resale for industrial use above the 7.5¢ per Mcf minimum contained in the conversion tariff.

charge the contract rate or charge to Mobile. This significant difference sets the two cases apart in fact and in law. In Mobile, the conversion tariff filing merely restated the rate from a percentage figure to a specific amount. The rate contracted for remained intact and the Court held that the rate filing in G-2210 was an abrogation of contract. But, in the *Tyler Gas* case, as the Court of Appeals for the Fifth Circuit held, the revised tariff rates proposed for the sale of gas to Tyler Gas were not violative of contract rights and were properly filed. As we have shown, prior to the filing of the conversion tariff, United received, pursuant to contract with Tyler Gas, 12¢ per Mcf for gas resold for domestic use and 80% of the proceeds of gas resold for industrial use. When the conversion tariff became effective, the rates were changed to 11.2¢ per Mcf for gas resold for domestice use and 7.5¢ per Mcf for gas resold for industrial use. Clearly, this was not just a restatement of a percentage amount in cents per Mcf. The rate for gas resold for domestic use, which never had been stated in terms of a percentage of the amount received by Tyler Gas, was reduced 0.8¢ per Mcf. United had, in accordance with the Commission's Regulations, converted from a contract rate to an *ex parte* tariff rate. And, Tyler Gas acquiesced in this significant change in its course of business. It accepted service rendered and paid for it in adherence to the new tariff rates from the date they became effective on August 3, 1952, until an increase in the tariff rates became effective subject to refund in Docket No. G-2210.

Indeed, Tyler Gas does not now seek to return to its contract rate. It accepts the tariff rate but inconsistently argues that United has no power to file later changes of the same character. As we have shown, however, the contract rate ceased to exist on August 3, 1952. From that date, the course of business between United and Tyler Gas has been governed by *ex parte* tariff rates. Tyler Gas

cannot now claim the validity of a non-existent contract provision to support one *ex parte* rate over another *ex parte* rate subsequently filed. The existence of *ex parte* tariff rates for the sale of gas to Tyler Gas having been established by the conversion tariff, changes in those rates may be filed *ex parte*

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without the prior agreement of the purchaser in accordance with appropriate procedure under the Act, for such a filing abrogates no contract rights.[6]

Tyler Gas and the City of Tyler filed their joint petition for rejection of United's rate filing in Docket No. G-9547 on October 21, 1955. On September 30, 1955, United had filed revisions to its tariff rates contained in its FPC Gas Tariff, First Revised Volume No. 1, proposing a general increase in its jurisdictional city gate rates. Included among the proposed revisions of its tariff rates were United's First Revised Sheets Nos. 4 and 16, which set forth the rate for the sale of gas to Tyler Gas for resale for domestic use (United's FPC Rate Schedule DG-C—General Service for Large Volume Distributors, Central Rate Zone) and for industrial use (United's FPC Rate Schedule IND-C—Large Volume Industrial Use Only, Central Rate Zone). By these proposed revisions to its tariff rates United sought to increase its then effective rates for

[6] Of course, the mere filing of an *ex parte* tariff rate does not constitute approval of the change by the Commission. The *ex parte* filing of a proposed change in the tariff rate in Docket No. G-2210, applicable to sales of gas to Tyler Gas for resale for domestic use, became effective only provisionally on December 25, 1953. After full hearing, in which Tyler Gas participated, we disallowed the provisional rates and when the Court of Appeals determined the procedural issue raised by Tyler Gas, a lower rate became effective in accordance with Opinion No. 277. We also directed the filing of a lower rate for resale for industrial use only. Hearings as to the reasonableness of the rates contained in the *ex parte* filings in Docket Nos. G-9547 and G-10592 have not yet been completed.

resale for domestic use by 2.5¢ per Mcf and for resale for industrial use only by 4.0¢ per Mcf.[7] Pursuant to Section 4 of the Act, by order issued October 26, 1955, we suspended the proposed revision in the rates so far as it related to sales for resale for domestic use (First Revised Sheet No. 4) until April 1, 1956. These rates are now in effect subject to refund upon final determination of the just and reasonable rates. By their joint petition Tyler Gas and the City of Tyler request an order rejecting the revised rates contained in First Revised Sheets Nos. 4 and 16 so far as they relate to sales to Tyler Gas.

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The second joint petition, filed by Tyler Gas and the City of Tyler on June 15, 1956, asks rejection of United's latest filed revision to its tariff rates in Docket No. G-10592, so far as it relates to sales of gas to Tyler Gas. By this revision, filed on May 15, 1956, United proposes an increase in the Docket No. G-9547 rates. Its proposed Second Revised Sheet No. 4 would increase the rate to Tyler Gas, for resale for domestic use, by 1.0¢ per Mcf and, subject to final determination by the Commission, United's proposed Second Revised Sheet No. 16 increased the rate for resale for industrial use under the IND-C rate schedule from 16.5¢ to 17.5¢ per Mcf. By order issued June 15, 1956, we suspended the effectiveness of the proposed rates for resale for domestic use until November 16, 1956, and until such further time as they may be made effective in the manner prescribed by the Natural Gas Act. We conclude that United's filings in Docket Nos. G-9547 and G-10592 are governed by the same rule which controls our action in the motion for refunds in Docket

[7] United's *ex parte* filing in G-9547 would change the rate for resale for domestic use from 17¢ per Mcf to 19.5¢ per Mcf for the first block and from 12.5¢ per Mcf to 15¢ per Mcf for the second block. The rate for resale for industrial use would increase from 12.5¢ per Mcf to 16.5¢ per Mcf.

No. G-2210. They are, like the *ex parte* filings in the conversion tariff and in Docket No. G-2210, proper proposals for changes in *ex parte* tariff rates. We cannot reject the proposals in Docket Nos. G-9547 and G-10592 on the procedural ground that they attempt to change a contract rate for the contract rate has long since ceased to exist. The relief requested by Tyler Gas and the City of Tyler must be denied.

Furthermore, with respect to the motion for refunds, the decision of the Court of Appeals for the Fifth Circuit affirming the decision of the lower court bars us from taking the action requested by Tyler Gas. On appeal from the decision of the District Court Tyler Gas listed eight specifications of error which, as the Court stated, "ring the changes on what it claims is the fundamental error of the trial court." (217 F. 2d 73, at pp. 76-77). Included among the specifications of error was an attack upon the holding that United may by the simple expedient of filing a revised schedule, without a prior hearing and finding that the contract rates are unjust, unreasonable or unlawful, disregard the contract terms fixing minimum rates. It should be re-emphasized that the District Court had found that the conversion rates had constituted a departure from the contract rates, that such conversion rates became the lawful rates, and that the contract rates upon which Tyler Gas sought equitable relief had not been in effect for a matter of several months prior to the filing of the tariff rates in Docket No. G-2210. The affirmance of the District Court decision and express approval of the "well considered and expressed views of the district judge" by the Court of Appeals in the face of the specifications of error alleged by Tyler Gas effectively dispose of all issues raised.

If we were to order the refunds requested by Tyler Gas, it would be necessary for us to find, contrary to the

law of the Tyler Gas ase, *supra*, that United's *ex parte* tariff rate in Docket No. G-2210 was improperly filed and should have been rejected. Since we are confronted by the same parties, with the same issues and the same facts on which the Court of Appeals rendered its decision, we are bound by that judicial determination. *Angel* v. *Bullington*, 330 U.S. 183; *Commissioner of Internal Revenue*,

v. *Sonnen*, 333 U.S. 591. Of course, the decision in the *Mobile* case has no bearing upon the conclusive effect of the *Tyler Gas* decision by the Court of Appeals for the Fifth Circuit. *Angel* v. *Bullington*, *supra*, at p. 187.

For the reasons stated above the Commission further *finds*:

(1) United's FPC Gas Tariff, Original Volume No. 1, the conversion tariff, filed on July 3, 1952, which became effective as to the rates for sale of gas to Tyler Gas on August 3, 1952, constituted a departure from the contract rates theretofore in effect. From August 3, 1952, there has been no contract rate in effect governing the sale of gas by United to Tyler Gas.

(2) The tariff rates filed by United in Docket Nos. G-2210, G-9547 and G-10592 were properly filed pursuant to the Natural Gas Act and the Commission's Regulations issued thereunder.

(3) The motion for refunds filed by Tyler Gas on May 15, 1956, in Docket No. G-2210, and the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler, Texas, on October 21, 1955, and June 15, 1956, request action which is contrary to the provisions of the Natural Gas Act and the Com-

mission's Regulations and which is not in the public interest. Hence, the motion and the joint petitions should be denied.

The Commission *orders*:

The motion for refunds filed by Tyler Gas on May 15, 1956, in Docket No. G-2210, and the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler, Texas, on October 21, 1955, and June 15, 1956, are hereby denied.

By the Commission.

LEON M. FUQUAY,
Secretary.

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos.
G-2210, G-9547 & G-10592

In the Matter of

UNITED GAS PIPE LINE COMPANY

Petition of Tyler Gas Service Company and City of Tyler, Texas for Rehearing

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Come now Tyler Gas Service Company and City of Tyler, Texas and pursuant to Section 19(a) of the Natural Gas Act and Rule 1.34 of the Rules of Practice and Procedure of the Federal Power Commission, file this their petition

for rehearing of Opinion and Order No. 294, issued October 2, 1956 in the above-styled matter.

In support of this petition Petitioners state as follows;

SPECIFICATIONS OF ERROR

1. The Commission erred in finding that United Gas Pipe Line Company's F.P.C. Gas Tariff, Original Volume 1, its so-called conversion tariff, filed on July 3, 1952, became effective to govern the rates for sales of gas to Tyler Gas on August 3, 1952.

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2. The Commission erred in finding that since August 3, 1952, there has been no contract rate in effect governing the sale of gas by United to Tyler Gas.

3. The Commission erred in failing to find that the increases in rates for sales of gas by United to Tyler Gas in Docket Nos. G-2210, G-9547 and G-10592 are in violation of the terms of valid and subsisting contracts between United and Tyler Gas and between United and the City of Tyler, and that those contracts are binding upon United.

4. The Commission erred in finding that the tariff rates filed by United in Docket Nos. G-2210, G-9547 and G-10592 were properly filed pursuant to the Natural Gas Act and the Commission's Regulations issued thereunder to govern the rates for sales of gas to Tyler Gas.

5. The Commission erred in finding that, under the findings and orders in Opinion No. 277, issued November 2, 1954, the DG-C and G-C rates approved by the Commission in that Opinion became applicable to govern sales of gas to Tyler Gas from the date the decision of the Court of Appeals for the Fifth Circuit in *Tyler Gas Service Company and City of Tyler, Texas* v. *United Gas Pipe Line Company*, 217 F. 2d 73, became final.

6. The Commission erred in finding that the Motion for Refund filed by Tyler Gas on May 15, 1956, in Docket No.

G-2210, and the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler, Texas request action which is contrary to the Natural Gas Act and the Commission's regulations and which is not in the public interest.

7. The Commission erred in finding that the decision of the United States Court of Appeals for the Fifth Circuit in *Tyler Gas Service Company and City of Tyler, Texas* v. *United Gas Pipe Line Company*, 217 F. 2d 73, affirming the decision of the United States District Court for the Eastern District of Texas (Civil No. 1662) bars it from granting the Motion for Refund filed by Tyler Gas in Docket No. G-2210.

8. The Commission erred in denying the Motion for Refund filed by Tyler Gas in Docket No. G-2210 and in denying the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler.

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UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

Docket Nos. G-1142, G-2210, G-9547 and G-10592

In the Matters of

UNITED GAS PIPE LINE COMPANY

Order Denying Petition for Rehearing

(Issued November 23, 1956)

Tyler Gas Service Company (Tyler Gas) and the City of Tyler, Texas, filed on October 26, 1956, a petition for

rehearing of the Commission's opinion No. 294 and accompanying order issued October 2, 1956. Opinion No. 294 denied a motion for refunds filed by Tyler Gas in docket No. G-2210 and joint petitions filed by Tyler Gas and the City of Tyler (referred to collectively herein as Petitioners), for rejection of rate increase filings in docket Nos. G-9547 and G-10592.

Essentially, the petition for rehearing is based upon four contentions. The basic issue raised is whether at the time of United Gas Pipe Line Company's (United) filing in docket No. G-2210 on June 24, 1953, there was in effect a contract rate between Tyler Gas and United. Petitioners claim also that the decision of the Court of Appeals for the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, 217 F. 2d. 73, does not bar Commission action on the motion for refunds in docket No. G-2210. Additionally, Petitioners question our holding that when the decision of the Court of Appeals became final in the *Tyler* case, *supra*, the settlement rates became applicable to United's sales to Tyler Gas as of August 1, 1954. Finally, it is argued that the City of Tyler has contract rights with United to have service continued to Tyler Gas at the rates in effect prior to the docket No. G-2210 filing.

Since opinion No. 294 specifically dealt with all but the last of these issues, it is not necessary to review our conclusions in detail. However, because the petition for rehearing evinces a lack of understanding of the basis for our decision, we shall here consider briefly the contentions raised by Petitioners.

Petitioners argue that the execution of a form service agreement is a condition precedent to the application of the conversion tariff to the sales of gas to Tyler Gas. Since Tyler Gas has not executed a form service

agreement, Petitioners contend that their acquiescence in the conversion rates constitued no more than a modification of the former rates, and that, therefore, United's rate increase filing in docket No. G-2210 constituted a proposed change in a contract rate.

It is clear, however, that the execution of a form service agreement is not a condition precedent to the applicability of the conversion tariff. Such an interpretation would leave without meaning Section 154.85 of the Commission's Regulations under the Natural Gas Act. That section specifies that only those terms of the pre-existing contracts, filed as rate schedules prior to the effective date of conversion tariff, which are not in conflict with other provisions of the tariff, shall remain in effect. This provision applies to the pre-existing contract between United and Tyler Gas which is on file as an executed service agreement. Upon our acceptance for filing of United's conversion tariff as it affected Tyler Gas effective August 3, 1952, the contract pricing provisions previously effective were not modified, they ceased to exist.

Thus, when United filed proposed increased rates to Tyler Gas on June 24, 1953 (docket No. G-2210) no provision of the pre-existing contract on file as an executed service agreement was proposed to be modified. The change proposed was in a separate section of the tariff—the rate schedule.

The course of business between United and Tyler Gas was altered by the conversion tariff filing so that the rates paid by Tyler Gas were no longer subject to private agreements between contracting parties. For reasons we outlined in opinion No. 294 and because of the nature of the industry, the Commission had found it necessary in the administration of the Natural Gas Act to convert from regu-

lation by individual contracts to regulation by tariffs in which rate provisions would have general applicability for customers of the same class in designated rate zones.

In their application for rehearing Petitioners urge that the decision of the Court of Appeals for the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, 217 F. 2d 73, does not constitute a bar to Commission action on the motion for refunds filed in docket No. G-2210 by Tyler Gas. They urge that the court decision was based upon a procedural ground of failure to exhaust administrative remedies and did not turn upon the merits of their contention that United could not file a unilateral change in rates.[1] Petitioners mistake the holding of the court. The

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Court of Appeals affirmed the judgment of the District Court that Tyler Gas and the City of Tyler had failed to show grounds for equitable relief in their suit to enjoin United from moving to put increased rates into effect subject to refund. But it is clear from the opinion of the District Court that failure to establish grounds for equitable relief is not based upon a failure to exhaust administrative remedies. That court held that "Federal jurisdiction exists by reason of diversity of citizenship and

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[1] We note, however, that this contention is directly contrary to the position taken by Tyler Gas on appeal from the District Court decision in the *Tyler* case. Thus, while the case was pending before the Court of Appeals, United moved to dismiss the proceeding on the ground that since the Commission had permitted the increased rates to go into effect subject to refund, the action for injunctive relief had become moot. In opposition to the motion to dismiss, Tyler Gas argued that the lower court decision "went all the way" and disposed of the case on the merits by dismissal of the entire controversy. See Appellants' Supplemental Answer to Appellee's Motion to Dismiss in the United States Court of Appeals for the Fifth Circuit, No. 15,034, *Tyler Gas Service Company and the City of Tyler, Texas, Appellants* v. *United Gas Pipe Line Company, Appellee*. United's motion to dismiss was denied.

amount in controversy, as alleged. Having jurisdiction as well of the parties and subject matter, I pass to the main question, whether the plaintiffs have made a case calling for the exercise of the equitable powers of the Court."[2]

The court went on to hold that—

> "United has followed the procedure prescribed by statute to secure this review [by the Commission of its rate filing pursuant to section 4 of the Act], and if it files the motion which plaintiffs allege it contemplates, and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (*Hope Nat. Gas Co.* v. *Fed. Power Comm.*, 196 F. 2d 803). *If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the*
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> *second or successive steps provided by the statute.* Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed 'the proposed change of rate, charge, classification, or service shall go into effect.' It is not for this Court to add another proviso, reading 'and where there is no private agreement or contract to the contrary.'" (Emphasis added.)

On this basis the District Court held that "Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commission and not of this Court."

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[2] See pp. 8-9, Memorandum Opinion in *Tyler Gas Service Company, et al.* v. *United Gas Pipe Line Company*, Civil Action No. 1662, December 29, 1953, attached as Exhibit "A" to Motion to Dismiss and Answer of United Gas Pipe Line Company to Petition of Tyler Gas Service Company and City of Tyler, Texas.

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In affirming the District Court, the Court of Appeals for the Fifth Circuit held, 217 F. 2d 73, 78—

> "the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme. So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4 (d) and (e) of the Act make plain, the court cannot do."

Thus, there can be no doubt but that the court decision dismissing the petition for injunctive relief was based upon denial of the merits of the contention that United's proposed change in rates in docket No. G-2210 was improperly filed. Since the court decision was upon the merits of the issue now urged upon us as grounds for refunds in docket No. G-2210, that decision bars our action on the motion for refunds in docket No. G-2210.

Petitioners' argument that opinion No. 277 did not decide the reasonableness of the level of the rates for sale of gas to Tyler Gas results from a misinterpretation of our decision. Because of the nature of Petitioners' contentions in the *Tyler* case, *supra*, we kept the record open in docket Nos. G-1142 and G-2210. This action was appropriate because if the Court of Appeals had held that the Commission lacked authority to accept United's proposed change in tariff rates to Tyler Gas in docket No. G-2210, then, without the reservations made in opinion No. 277, we would have been

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required to institute entirely new proceedings to determine the just and reasonable rates to Tyler Gas. The reserva-

tions contained in paragraphs (I) and (O) kept open the section 5 (a) investigation and the section 4 (e) proceedings for this purpose.

It should be noted that where substantive issue was taken to our decision with respect to rate level, we specifically provided for further hearings. Thus, we directed that additional hearings be held concerning the issues raised by Mississippi River Fuel Corporation respecting its right to separate rates.[3]

Further demonstration that our determination of the reasonableness of the rates in opinion No. 277 applied to sales of gas to Tyler Gas, subject only to the possibility that Petitioners might prevail in their court action, is shown by other provisions which excepted only the rates to Mississippi. Thus, we disallowed and denied the increased rates proposed by United in docket No. G-2210 "except insofar as such rates and charges are applicable to sales and services to Mississippi [River Fuel Corporation]."[4] And, we directed United to revise its FPC Gas Tariff, Original Volume No. 1, *as to all sales and services rendered by it to its utility customers, except* Mississippi, by filing . . . new schedules . . . to be effective on and after August 1, 1954." (Emphasis added.)[5]

Clearly, when Petitioners failed in their court action, the rates found just and reasonable in opinion No. 277 became effective as to sales of gas to Tyler Gas "on and after August 1, 1954."

Finally, the City of Tyler claims that it has a contract with United for delivery of gas to Tyler Gas at the rates

[3] Opinion No. 277, *In the Matters of United Gas Pipe Line Company*, docket Nos. G-1142, G-2019, G-2210, *et al.*, issued November 2, 1954; ordering paragraph (G).

[4] Ordering paragraph (A).

[5] Ordering paragraph (B).

specified in the 1946 contract between United and Tyler which was in effect prior to the conversion tariff filing. It should be noted that even if United did enter into such a contract with the City of Tyler, it would not be enforceable here. The only legal rate is the filed rate. *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, 341 U.S. 246 (1951). And, the filed rate is for sale of gas by United to Tyler Gas, under the appropriate rate schedule. The separate claims of the City of Tyler have no place in these proceedings.

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The Commission *finds:*

The petition for rehearing of our opinion No. 294 and accompanying order issued on October 2, 1956, sets forth no new facts and no principles of law which either were not fully considered by the Commission when it adopted said opinion and order or which having now been considered warrant any change in or modification of such order. All contentions and objections not specifically discussed herein have been considered and found either without basis in law or support in fact, but are not sufficiently material to warrant individual treatment or have been adequately disposed of otherwise.

The Commission *orders:*

The petition filed on October 26, 1956, by Tyler Gas and the City of Tyler for rehearing of our opinion No. 294 and accompanying order issued on October 2, 1956, is hereby denied and the proceedings herein are hereby terminated.

By the Commission.

/S/ LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15,034

TYLER GAS SERVICE COMPANY and THE CITY OF TYLER, TEXAS,
Appellants,

v.

UNITED GAS PIPE LINE COMPANY, *Appellee.*

Appellants' Answer to Appellee's Motion to Dismiss Cause

To the Honorable Judges of Said Court of Appeals:

Come now TYLER GAS SERVICE COMPANY and the CITY OF TYLER, TEXAS, Appellants in the above styled and numbered cause, and submit this, their Answer to

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the Motion of the Appellee, UNITED GAS PIPE LINE COMPANY, to dismiss this appeal, and respectfully show to the Court:

. . . . . .

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3.

The application of Plaintiffs for temporary injunction is denied and this cause is herewith in all things dismissed for failure of the Bill of Complaint to state or show grounds for equitable relief.

4.

All costs in this behalf incurred are herewith taxed against Plaintiffs, for which the officers of this Court may have their several executions.

Thus it appears that the Trial Court, by its aforesaid Decree not only denied the Appellants the relief which they

sought by preliminary injunction, but the Court went much further and dismissed the action in entirely "for failure of the Bill of Complaint to state or show grounds for equitable relief." It is from such Decree of the Trial Court that this appeal is being prosecuted.

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However, upon the hearing in the Court below on the application for preliminary injunction, the Trial Court not only denied the preliminary injunction sought by Appellants, but the Court also dismissed the action in entirety for the stated reason that the Complaint failed to show grounds for equitable relief. Such action of the Trial Court in dismissing the cause evidently was in response to the motion to dismiss contained in Appellee's answer to the effect that the Complaint failed to state a cause upon which relief could be granted.

Therefore, it is apparent that the appeal which is here taken comprehends not only the Order of the Court below in denying the preliminary injunction, but also seeks a review of the action of the Trial Court in entering final judgment which purported to dismiss the cause on its merits and in its entirety.

It will be borne in mind that the revised schedule of increased rates which United had filed with the Federal Power Commission, and which are in contravention

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of its obligations to Tyler Gas and to the City, have in nowise been approved by the Federal Power Commission. In fact, said Commission has stated, as is reflected by its Order dated July 10, 1953, that said revised rates "have not been shown to be justified and may be unjust or unreason-

able or otherwise unlawful." (Plaintiffs' Exhibit No. 26, and Exhibit C affixed to Defendant's Answer.)

A hearing before an Examiner of the Commission regarding the proposed schedule of increased rates was commenced on July 20, 1953, but same was adjourned prior to the conclusion of the direct evidence offered by the United. Although other dates for the resumption of such hearing have been set in the interim the further presentation has been postponed from time to time. When such hearings are resumed United will be expected to continue presentation of its evidence in support of the application for revised rates. Thereafter the Staff Counsel for the Commission, and other interested parties, will be expected to conduct cross-examination of United's witnesses. Upon conclusion thereof, Staff Counsel and Interveners, and other interested parties, will present evidence bearing upon United's application. At the conclusion of all the evidence the record, in due course, will be submitted

to the Federal Power Commission for study, assimilation and final decision.

Just when such final decision of the Federal Power Commission upon such application will be rendered can not be forecast. In the light of past experience it may be assumed that same will not be handed down at any time in the near future. In any event, the fact remains that at the time of the hearing of this cause in the Court below, as well as at the present, there has been no adjudication whatever by the Federal Power Commission concerning the justness, reasonableness or lawfulnes of the increased rates which were filed by the United. Neither has there been any determination by the Commission of the claims and rights of these Appellants who have intervened in said proceeding,

respecting the violation of the contractual obligations which United entered into with the Appellants.

In the meantime United is charging Tyler Gas for gas purchased on the basis of the proposed increased rate schedule, and has been so doing since December 25, 1953. Although by its Order dated July 10, 1953, the Federal Power Commission suspended the operation of the proposed increased rates for a period of five months ending Dec. 25, 1953, it appears to have been powerless to grant further suspension in virtue of the provisions of the

Natural Gas Act.

Consequently, Appellants here invoked the authority of a Court of Equity for the protection of their rights which the Federal Power Commission appears to have been powerless to preserve. The authorities are many and convincing that a Court of Equity may exercise its well-recognized power to preserve the status quo pending an ultimate decision by an administrative body in order to prevent irreparable injury, when the administrative body is powerless so to do. Support of such proposition is found in numerous decisions of the Supreme Court of the United States, including the following:

Prendergast v. *New York Teleph. Co.*, 262 U. S. 43, 67 L. Ed. 853

Smith v. *Ill. Bell Teleph. Co.*, 270 U. S. 588, 70 L. Ed. 747

Scripps-Howard Radio v. *Federal Commun. Com.*, 316 U. S. 4, 86 L. Ed. 1231

Pac. Tel. & Tel. Co. v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975

Okla. Natural Gas Co. v. *Russell*, 261 U. S. 290, 67 L. Ed. 659

Public Utilities Com. of Ohio v. *United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 397

Banton v. *Belt Line Ry. Corp.*, 268 U. S. 413, 69 L. Ed. 1020

Columbia Broadcasting System v. *United States of America*, 316 U. S. 407, 86 L. Ed. 1563

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In the opinion in the case last cited Chief Justice Stone made the following cogent statement:

"• • • The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

It is true that perforce the inadequacies of the provisions of the Natural Gas Act to enable the Federal Power Commission to maintain the status quo pending final determination by said body of the validity of the new rate schedule as against the contractual rights of the Appellants herein, United was allowed to put the increased rates into effect at the expiration of the five-months suspension period on December 25, 1953. Be that as it may, the fact remains that the Federal Power Commission has not yet passed upon the reasonableness, justness or lawfulness of such increased rates and no indication has been given when same will be done. In the meantime the rights of Appellants are being disregarded to their irreparable injury, in advance of an adjudication

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thereof. The only power that could have prevented such unconscionable violation of Appellants' rights, viz., a Court of Equity, had denied all relief. To further aggravate the injury, Appellee is now seeking to deny Appellants the right to have the action of the Court below reviewed on appeal, by contending that the cause is moot.

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Conceding for the sake of argument that if the particular facet of this litigation, wherein preliminary injunction was sought to enjoin United from filing a motion with the Federal Power Commission to make the increased rate schedule effective upon the expiration of the five-months suspension period, is no longer litigable, there nevertheless remains for consideration by this Honorable Court of Appeals the action of the trial Court in dismissing the Complaint for failure to state grounds of equitable relief. Obviously the Court's action in the latter particular strikes at the core of this litigation. Nothing has yet taken place which renders the controlling issue in this case moot.

Therefore, in rendering judgment in this cause the Trial Court made disposition of two separate and distinct issues, viz., (1) the right of Appellants to have preliminary injunction issue to restrain the Appellee

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from filing a motion with the Federal Power Commission at the end of the suspension period to make the proposed rates effective; and (2) the right of the Appellants to preserve the contractual obligations of United to Tyler Gas and to the City, at least until the Federal Power Commission shall have made final determination of United's application to revise or modify the existing rates.

If the first issue should indeed have become moot, pending this appeal, then most assuredly Appellants are still entitled to have this Honorable Court of Appeals pass upon the correctness of the Trial Court's decree in rendering an adverse decision upon the second issue, which in no respect has otherwise been determined.

The Courts have repeatedly declared the rule that when one segment of a cause raising a particular issue is no longer controversial, the Court will nevertheless give due consideration to all other issues raised in the cause which

have not become moot. This Honorable Court of Appeals for the Fifth Circuit has announced this principle of law in a number of decisions, among which are the following:

City of Miami v. *McCrory Stores Corp.*, 181 Fed. 2d 368;
Hudson v. *Newell*, 172 Fed. 2d 848;

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Fleming v. *Farmers Peanut Co.*, 128 Fed. 2d 404;
Shinholt v. *Angle*, 90 Fed. 2d 297.

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15034

TYLER GAS SERVICE COMPANY AND THE CITY OF TYLER, TEXAS, *Appellants*,

versus

UNITED GAS PIPE LINE COMPANY, *Appellee*.

Appeal from the United States District Court for the Eastern District of Texas

(May 31, 1954)

On Motion to Dismiss Appeal as Moot

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

PER CURIAM: Alleging in substance that the object of the appeal was to secure a reversal of an order denying plaintiff's prayer for a preliminary

injunction, and that matters subsequent[1] to the denial have rendered the appeal moot, appellee concludes:

> "From the foregoing it appears that Appellants filed suit to enjoin the filing of a motion by Appellee pursuant to Sec. 4(e) of the Natural Gas Act to put into effect increased rates which had heretofore been suspended by the Federal Power Commission pursuant to the terms and provisions of Section 4(e) and which motion would be subject to being filed on December 24, 1953, the first

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[1] "MATTERS SUBSEQUENT TO DENIAL OF INJUNCTION RENDERING CASE MOOT:

"(a) On Dec. 24, 1953, the next day after denial of injunction by the Trial Court, Appellee filed in Docket G-2210 with the Federal Power Commission a motion pursuant to Sec. 4(e) of the Natural Gas Act as amended to put suspended rates into effect including rates applicable to the sale to Tyler Gas Service Company; the certificate of service showing that copy of said motion was served upon the Appellants Tyler Gas Service Company and the City of Tyler. Copy of said motion marked Exhibit 'A' is attached hereto and hereof made a part the same as though fully copied and set out herein.

"*This was the motion, the filing of which Appellants sought to enjoin by the maintenance and pendency of this cause.*

"(b) On 20 January, 1954, the Federal Power Commission adopted an order which it issued 25 January, 1954, in Docket G-2210 ordering such suspended rates, including those applicable to Appellant Tyler Gas Service Company, to go into effect on 25 December, 1953, subject to the execution and delivery of bond conditioned for the refunding to those who would be entitled, including Appellant Tyler Gas Service Company, should the Commission upon final order to be entered in the hearing in said Docket G-2210, find and require that the just and reasonable rate was lower than the proposed rates, and being conditioned to the refund for those entitled thereto for the difference between the approved rate and the proposed rate, if any difference there should be. A copy of this order accepting and sustaining the motion putting into effect increased rates is marked Exhibit 'B', attached hereto, and hereof made a part.

"(c) Thereafter, and on 29 January, 1954, Appellee executed and forwarded to the Federal Power Commission a bond in accordance with the terms and provisions of the order issued 25 January, 1954. A copy of said bond marked Exhibit 'C' is attached hereto and hereof made a part the same as though fully copied and set out herein.

"(d) On 12 February, 1954, Leon M. Fuquay, Esquire, Secretary of the Federal Power Commission, executed a letter to one William H. Forlines, a representative of Appellee in Washington, D. C., advising that the undertaking of such bond was satisfactory and had been accepted by the commission for filing. A copy of this letter, approving said bond, is marked Exhibit 'D', attached hereto and hereof made a part."

day after the end of the five months' suspension period permitted by the Act and ordered by the said Commission; that on December 23, 1953, the Trial Court, for reasons assigned, denied said injunction; that thereupon Appellee filed said motion with the Federal Power Commission; the filing of which Appellants had sought by this cause to enjoin, notice of said filing being given to Appellants, whereby this cause became moot for the act which was sought to be enjoined has been done and no judgment entered pursuant to Appellants' Bill of Complaint could now have operative effect and 'nothing would be accomplished by reversing the judgment, dismissing the petition, if it be erroneous'. (State of Florida ex rel Watson v. Frasier (1946, 5 C.C.A.) 154 F.2d 288).

So concluding, it moves to dismiss the appeal as moot.

For answer, appellants reply:

"The Statement contained in Appellee's Motion to Dismiss filed herein, that Appellants sought by this suit to enjoin Appellee from filing a motion under the provisions of the Natural Gas Act to put into effect a schedule of increased rates for gas sold by it to Tyler Gas, comprehends only a portion of the relief sought by the Appellants in this suit. Not only was this suit to enjoin the United from pursuing certain steps provided by the Natural Gas Act to make effective an increased schedule of rates, but Appellants also sought herein to enjoin permanently the United from violating its express contractual obligations to Ap-

pellants that the existing rates would constitute the maximum rates which United would charge for gas sold to Tyler Gas during the stipulated sixteen year term.

"As reflected by the prayer in Appellants' Complaint, the injunctive relief sought by Appellants con-

sisted of the following: (1) That United be enjoined from undertaking to put into effect the increased schedule of rates proposed for sale of gas to Tyler Gas, which had been filed with the Federal Power Commission and which was (and is) pending for consideration and determination; (2) from violating the existing contracts between Tyler Gas and United and between the City and United; (3) declaring said contracts to be valid, subsisting and enforceable; and (4) for general relief. It was further prayed that a preliminary injunction be issued and that upon trial of the cause on its merits such injunction be made permanent."

Further pointing out that the district judge not only denied their prayer for a preliminary injunction, but, upon the prayer of respondent, entered a final judgment dismissing the cause, appellants continued:

"Thus it appears that the Trial Court, by its aforesaid Decree not only denied the Appellants the relief which they sought by preliminary injunctions but the Court went much further and dismissed the action in entirety 'for failure of the Bill of Complaints to state or show grounds for equitable relief.' It is

from such Decree of the Trial Court that this appeal is being prosecuted."

Then vigorously arguing the merits of their appeal from the dismissal of their suit, appellants conclude:

"Thus it appears beyond cavil that in dismissing this cause for failure to state grounds of equitable relief, the Court below acted in direct contravention of the principle of law which is announced in the foregoing authorities, as well as in many others which we shall not undertake to cite in this connection. As is reflected by the Statement of Appellants' Points appearing in the record in this cause, the principal

issues raised on this appeal pertain to the correctness of the decision of the District Court in its aforesaid holding. There should be no question that Appellants are entitled to have such ruling presented to, reviewed and determined by, this Honorable Court of Appeals. Otherwise, it would follow that Appellants would be deprived of their 'day in court.'"

Without, of course, undertaking to consider or assess the correctness of the arguments on the merits thus stoutly advanced, we are convinced that the appeal is not, as contended by appellee in its motion, merely an appeal from an interlocutory order and, therefore, moot. On the contrary, we are in no doubt that it is an appeal from a final judgment determining the case on the merits against appellant, the correctness of which appellant has a right to have this court determine; and that the motion

to dismiss the appeal as moot should be, and it is, hereby DENIED.

A True copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

(p 312 b
trans)

SERVICE AGREEMENT - FORM A

(Applicable to Service to Distributors
except for Service under 'IND' Rate Schedules)

THIS AGREEMENT, made and entered into this _____ day of _____, _____, by and between UNITED GAS PIPE LINE COMPANY, a Delaware Corporation, hereinafter called "Seller," and _____, hereinafter called "Buyer,"

W I T N E S S E T H :

In consideration of the covenants and agreements hereinafter set forth, to be kept and performed by the parties hereto, it is agreed by and between said parties as follows:

ARTICLE I
SCOPE OF AGREEMENT

Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas as follows:

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE II
DELIVERY POINT, QUANTITY AND PRESSURE

Delivery of natural gas by Seller to Buyer for each distribution system (not including farm taps and rural service lines) shall be made at the outlet of Seller's facilities at the points designated on Exhibit "A" attached to this Service Agreement, and at any additional point or points mutually agreed upon by the parties and added by revising Exhibit "A". The maximum quantity of gas deliverable by Seller to Buyer hereunder in any one day at any delivery point shall be the quantity specified for such delivery point in Exhibit "A", provided that the aggregate volume deliverable on any day at all such delivery points hereunder shall not exceed the Maximum Daily Delivery Obligation stated in Article III hereof.

Such gas shall be delivered hereunder at such pressure (not to exceed_____ (_____) pounds or such pressures as may be shown in Exhibit "A") as may be necessary to meet Buyer's requirements, from time to time, at said points of delivery.

Buyer agrees to take and receive gas hereunder at the pressure herein provided for and thereafter to regulate and control said gas to the extent necessary for its operations.

ARTICLE III
MAXIMUM DAILY DELIVERY OBLIGATION

Unless and until increased pursuant to the later provisions of this Article, Seller shall not be required to deliver to Buyer hereunder, and Buyer shall not be entitled to receive from Seller, in any one day, more than an aggregate of_____ cubic feet of gas, which quantity is hereby designated as Seller's "Maximum Daily Delivery Obligation."

Should Buyer desire, at any time any increase in maximum daily deliveries from Seller over and above the Maximum Daily Delivery Obligation of Seller, it may notify Seller in writing of the amount of the increase desired and of the date it desires the increased deliveries commenced. Within 120 days from the receipt of the notice, Seller shall notify Buyer in writing whether or not, considering,

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE III
MAXIMUM DAILY DELIVERY OBLIGATION
(Continued)

(a) the remaining term of the Service Agreement, (b) the requirements of Seller's other customers, (c) Seller's available gas and system capacity, and (d) whether Seller can obtain the necessary governmental authorizations and obtain and install any necessary additional equipment and facilities within the required time, Seller will be willing to furnish to Buyer the additional quantities of gas stated in Buyer's notice.

If the notice from Seller states that it will furnish the additional quantities of gas, the Maximum Daily Delivery Obligation hereunder shall be increased to include such additional gas effective on the date the parties agree upon in the new Service Agreement prepared to reflect the new understanding. If the notice from Seller states it will not deliver the additional quantities of gas covered by Buyer's notice, the Maximum Daily Delivery Obligation shall remain unchanged.

For each Billing Area Unit covered by this Service Agreement, where Seller supplies to Buyer less than the entire requirements of gas for Buyer's distribution system or facilities served under this Service Agreement, Buyer shall, as nearly as practicable, receive gas hereunder at the same hourly and daily load factor as that at which Buyer receives its entire requirements of gas for such distribution system or facilities.

ARTICLE IV
SALES TO RURAL CONSUMERS

Where provision is made in Article I hereof for sale of gas for the purposes of this Article IV, Seller will deliver gas in addition to the quantities specified in Articles II and III to Buyer in accordance with Section 4.5 of the General Terms and Conditions of Seller's Tariff for resale by Buyer for domestic purposes to rural consumers through farm taps and rural service lines along and in the vicinity of Seller's pipe lines adjacent to and in the same general

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE IV
SALES TO RURAL CONSUMERS
(Continued)

territory as any distribution system of Buyer supplied by Seller. Upon request therefor by Seller, Buyer will sell gas, purchased from Seller, to such rural consumers, for such purposes in accordance with Buyer's standard and applicable service policy, rate and contract, and all gas sold by Seller to Buyer for such purposes will be delivered to Buyer at the cut off valves at the termini of Seller's service taps, installed and operated above ground at Seller's cost and expense along and adjacent to its pipe line.

ARTICLE V
PRICE

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule _____ or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE VI
TERM

This agreement shall become effective on_____ and shall continue and remain in force and effect for a period

ARTICLE VII
MODIFICATION

No modification of the terms and provisions of this Service Agreement, other than in Exhibit "A" as herein provided for, shall be or become effective except by the execution of a superseding Service Agreement.

ARTICLE VIII
SUBJECT HEADINGS

The subject headings of the Articles of this agreement are inserted for convenient reference and are not to be considered in any interpretation of same.

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE IX
AGREEMENTS BEING SUPERSEDED

This agreement supersedes, cancels and terminates, as of the effective date of the term of this Service Agreement the following existing arrangements, agreements, contracts and Service Agreements with respect to the sale of natural gas by Seller to Buyer for the purposes set forth in Article I hereof:

Both parties shall be released from any and all obligations under said arrangements, agreements, contracts and Service Agreements except as to the obligation of Buyer to pay for all gas delivered hereunder by Seller prior to the effective date of the term of this Service Agreement, and for which payment has not been made.

ARTICLE X
CHANGE OF OWNERSHIP

If all or any part of Buyer's distribution system or systems, into which the gas sold hereunder is received, are voluntarily sold or exchanged by Buyer, then, and in such event, Buyer agrees that it will cause the person, firm or corporation so acquiring such facilities to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees that it will cause the person,

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE X
CHANGE OF OWNERSHIP
(Continued)

firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the property so sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

ARTICLE XI
SUCCESSORS AND ASSIGNS

This agreement shall be binding upon and inure to the benefit of the successors and assigns of each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate originals.

_____
(Buyer)

By _____
(Title)

ATTEST:

_____

UNITED GAS PIPE LINE COMPANY

By _____
Vice President

ATTEST:

_____
Secretary

SERVICE AGREEMENT - FORM A
(Continued)

Exhibit A

Effective _____

to Service Agreement dated _____

(Supersedes Exhibit "A" effective on _____)

Delivery Point Location	Maximum Daily Delivery Obligation	Delivery Pressure

_____ (Buyer)

By _____ (Title)

United Gas Pipe Line Company

By _____ (Title)

SERVICE AGREEMENT - FORM B

(Applicable to Service for Resale to Large Volume Industrial Use Only Customers)

THIS AGREEMENT, made and entered into this _____ day of _____, _____, by and between UNITED GAS PIPE LINE COMPANY, a Delaware Corporation, hereinafter called "Seller," and _____, hereinafter called "Buyer,"

W I T N E S S E T H :

In consideration of the covenants and agreements hereinafter set forth, to be kept and performed by the parties hereto, it is agreed by and between said parties as follows:

ARTICLE I
SCOPE OF AGREEMENT

Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas for resale for large volume industrial use only to the following customers of Buyer:

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE II
DELIVERY POINT AND PRESSURE

Delivery of natural gas by Seller to Buyer for resale for each large volume industrial use only customer shall be made at the outlet of Seller's facilities at the points designated below; and such gas shall be delivered hereunder at such pressures as may be necessary to meet Buyer's requirements, from time to time, at said points of delivery, but not to exceed the pressures shown below:

Name of Large Volume Industrial Use Only Customer	Delivery Point Location	Delivery Pressure

Buyer agrees to take and receive gas hereunder at the pressure herein provided for and thereafter to regulate and control said gas to the extent necessary for its operations.

ARTICLE III
MAXIMUM DAILY DELIVERY OBLIGATION

Unless and until increased pursuant to the later provisions of this Article, Seller shall not be required to deliver to Buyer hereunder, and Buyer shall not be entitled to receive from Seller, in any one day, more than the volume of gas specified below for each large volume industrial use only customer of Buyer, which quantity is hereby designated as Seller's "Maximum Daily Delivery Obligation" applicable to such industrial customer:

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE III
MAXIMUM DAILY DELIVERY OBLIGATION
(Continued)

Name of Large Volume Industrial Use Only Customer	Applicable Maximum Daily Delivery Obligation

Should Buyer desire, at any time any increase in maximum daily deliveries from Seller over and above the Maximum Daily Delivery Obligation of Seller specified above for any industrial customer, it may notify Seller in writing of the amount of the increase desired and of the date it desires the increased deliveries commenced. Within 120 days from the receipt of the notice, Seller shall notify Buyer in writing whether or not, considering, (a) the remaining term of the Service Agreement, (b) the requirements of Seller's other customers, (c) Seller's available gas and system capacity, and (d) whether Seller can obtain the necessary governmental authorizations and obtain and install any necessary additional equipment and facilities within the required time, Seller will be willing to furnish to Buyer the additional quantities of gas stated in Buyer's notice.

If the notice from Seller states that it will furnish the additional quantities of gas, the applicable Maximum Daily Delivery Obligation shall be increased to include such additional gas effective on the date the parties agree upon in the new Service Agreement prepared to reflect the new understanding. If the notice from Seller states it will not deliver the additional quantities of gas covered by Buyer's notice, the Maximum Daily Delivery Obligation shall remain unchanged.

For each large industrial use only customer covered by this Service Agreement, where Seller supplies to Buyer less than the entire requirements of gas for such industrial customer, Buyer shall, as nearly as practicable, receive gas hereunder at the same hourly and daily load factor as that at which Buyer delivers to such industrial customer.

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE IV
PRICE

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule _____, or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

ARTICLE V
TERM

This agreement shall become effective on _____ and shall continue and remain in force and effect for a period

ARTICLE VI
MODIFICATION

No modification of the terms and provisions of this Service Agreement shall be or become effective except by the execution of a superseding Service Agreement.

SERVICE AGREEMENT - FORM A

(Applicable to Service to Distributors
except for Service under 'IND' Rate Schedules)

THIS AGREEMENT, made and entered into this _____ day of _____, _____, by and between UNITED GAS PIPE LINE COMPANY, a Delaware Corporation, hereinafter called "Seller", and _____, hereinafter called "Buyer",

WITNESSETH:

In consideration of the covenants and agreements hereinafter set forth, to be kept and performed by the parties hereto, it is agreed by and between said parties as follows:

ARTICLE I
Scope of Agreement

Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas as follows:

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE II
Delivery Point, Quantity and Pressure

Delivery of natural gas by Seller to Buyer for each distribution system (not including farm taps and rural service lines) shall be made at the outlet of Seller's facilities at the points designated on Exhibit "A" attached to this Service Agreement, and at any additional point or points mutually agreed upon by the parties and added by revising Exhibit "A". The maximum quantity of gas deliverable by Seller to Buyer hereunder in any one day at any delivery point shall be the quantity specified for such delivery point in Exhibit "A", provided that the aggregate volume deliverable on any day at all such delivery points hereunder shall not exceed the Maximum Daily Quantity stated in Article III hereof.

Such gas shall be delivered hereunder at such pressure (not to exceed _____ (_____) pounds or such pressures as may be shown in Exhibit "A") as may be necessary to meet Buyer's requirements, from time to time, at said points of delivery.

Buyer agrees to take and receive gas hereunder at the pressure herein provided for and thereafter to regulate and control said gas to the extent necessary for its operations.

ARTICLE III
Maximum Daily Quantity

Unless and until increased pursuant to the later provisions of this Article, Seller shall not be required to deliver to Buyer hereunder, and Buyer shall not be entitled to receive from Seller, in any one day, more than an aggregate of _____ cubic feet of gas, which quantity is hereby designated as Seller's "Maximum Daily Quantity".

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE III
Maximum Daily Quantity
(Continued)

Should Buyer desire, at any time any increase in maximum daily deliveries from Seller over and above the Maximum Daily Quantity of Seller, it may notify Seller in writing of the amount of the increase desired and of the date it desires the increased deliveries commenced. Within 120 days from the receipt of the notice, Seller shall notify Buyer in writing whether or not, considering, (a) the remaining term of the Service Agreement, (b) the requirements of Seller's other customers, (c) Seller's available gas and system capacity, and (d) whether Seller can obtain the necessary governmental authorizations and obtain and install any necessary additional equipment and facilities within the required time, Seller will be willing to furnish to Buyer the additional quantities of gas stated in Buyer's notice.

If the notice from Seller states that it will furnish the additional quantities of gas, the Maximum Daily Quantity hereunder shall be increased to include such additional gas effective on the date the parties agree upon in the new Service Agreement prepared to reflect the new understanding. If the notice from Seller states it will not deliver the additional quantities of gas covered by Buyer's notice, the Maximum Daily Quantity shall remain unchanged.

For each Billing Area Unit covered by this Service Agreement, where Seller supplies to Buyer less than the entire requirements of gas for Buyer's distribution system or facilities served under this Service Agreement, Buyer shall, as nearly as practicable, receive gas hereunder at the same hourly and daily load factor as that at which Buyer receives its entire requirements of gas for such distribution system or facilities.

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE IV
Sales to Rural Consumers

Where provision is made in Article I hereof for sale of gas for the purposes of this Article IV, Seller will deliver gas in addition to the quantities specified in Articles II and III to Buyer in accordance with Section 4.5 of the General Terms and Conditions of Seller's Tariff for resale by Buyer for domestic purposes to rural consumers through farm taps and rural service lines along and in the vicinity of Seller's pipe lines adjacent to and in the same general territory as any distribution system of Buyer supplied by Seller. Upon request therefor by Seller, Buyer will sell gas, purchased from Seller, to such rural consumers, for such purposes in accordance with Buyer's standard and applicable service policy, rate and contract, and all gas sold by Seller to Buyer for such purposes will be delivered to Buyer at the cut-off valves at the termini of Seller's service taps, installed and operated above ground at Seller's cost and expense along and adjacent to its pipe line.

ARTICLE V
Price

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedules _____, or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE VI
Term

This agreement shall become effective on _____ and shall continue and remain in force and effect for a period _____.

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE VII
Modification

No modification of the terms and provisions of this Service Agreement, other than in Exhibit "A" as herein provided for, shall be or become effective except by the execution of a superseding Service Agreement.

ARTICLE VIII
Subject Headings

The subject headings of the Articles of this agreement are inserted for convenient reference and are not to be considered in any interpretation of same.

ARTICLE IX
Agreements Being Superseded

This agreement supersedes, cancels and terminates, as of the effective date of the term of this Service Agreement the following existing arrangements, agreements, contracts and Service Agreements with respect to the sale of natural gas by Seller to Buyer for the purposes set forth in Article I hereof:

Both parties shall be released from any and all obligations under said arrangements, agreements, contracts and Service Agreements except as to the obligation of Buyer to pay for all gas delivered hereunder by Seller prior to the effective date of the term of this Service Agreement, and for which payment has not been made.

SERVICE AGREEMENT - FORM A
(Continued)

ARTICLE X
Change of Ownership

If all or any part of Buyer's distribution system or systems, into which the gas sold hereunder is received, are voluntarily sold or exchanged by Buyer, then, and in such event, Buyer agrees that it will cause the person, firm or corporation so acquiring such facilities to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the property so sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

ARTICLE XI
Successors and Assigns

This agreement shall be binding upon and inure to the benefit of the successors and assigns of each of the parties hereto.

SERVICE AGREEMENT - FORM A
(Continued)

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate originals.

_____
(Buyer)

By _____
(Title)

ATTEST:

_____

UNITED GAS PIPE LINE COMPANY

By _____
Vice President

ATTEST:

_____
Secretary

SERVICE AGREEMENT - FORM A
(Continued)

Exhibit A

Effective _____

to Service Agreement dated _____

(Supersedes Exhibit "A" effective on _____)

Delivery Point Location	Maximum Daily Quantity	Delivery Pressure

_____ (Buyer)

By _____ (Title)

United Gas Pipe Line Company

By _____ (Title)

SERVICE AGREEMENT - FORM B

(Applicable to Service for Resale to Large Volume Industrial Use Only Customers)

THIS AGREEMENT, made and entered into this _____ day of _____, _____, by and between UNITED GAS PIPE COMPANY, a Delaware Corporation, hereinafter called "Seller", and _____, hereinafter called "Buyer",

WITNESSETH:

In consideration of the covenants and agreements hereinafter set forth, to be kept and performed by the parties hereto, it is agreed by and between said parties as follows:

ARTICLE I
Scope of Agreement

Subject to the terms, conditions and limitations hereof, Seller agrees to sell and deliver or cause to be delivered to Buyer, and Buyer agrees to purchase and receive from Seller and pay Seller for natural gas for resale for large volume industrial use only to the following customers of Buyer:

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE II
Delivery Point and Pressure

Delivery of natural gas by Seller to Buyer for resale for each large volume industrial use only customer shall be made at the outlet of Seller's facilities at the points designated below; and such gas shall be delivered hereunder at such pressures as may be necessary to meet Buyer's requirements, from time to time, at said points of delivery, but not to exceed the pressures shown below:

Name of Large Volume Industrial Use Only Customer	Delivery Point Location	Delivery Pressure

Buyer agrees to take and receive gas hereunder at the pressure herein provided for and thereafter to regulate and control said gas to the extent necessary for its operations.

ARTICLE III
Maximum Daily Quantity

Unless and until increased pursuant to the later provisions of this Article, Seller shall not be required to deliver to Buyer hereunder, and Buyer shall not be entitled to receive from Seller, in any one day, more than the volume of gas specified below for each large volume industrial use only customer of Buyer, which quantity is hereby designated as Seller's "Maximum Daily Quantity" applicable to such industrial customer:

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE III
Maximum Daily Quantity
(Continued)

Name of Large Volume Industrial Use Only Customers	Applicable Maximum Daily Quantity

Should Buyer desire, at any time any increase in maximum daily deliveries from Seller over and above the Maximum Daily Quantity of Seller specified above for any industrial customer, it may notify Seller in writing of the amount of the increase desired and of the date it desires the increased deliveries commenced. Within 120 days from the receipt of the notice, Seller shall notify Buyer in writing whether or not, considering, (a) the remaining term of the Service Agreement, (b) the requirements of Seller's other customers, (c) Seller's available gas and system capacity, and (d) whether Seller can obtain the necessary governmental authorizations and obtain and install any necessary additional equipment and facilities within the required time, Seller will be willing to furnish to Buyer the additional quantities of gas stated in Buyer's notice.

If the notice from Seller states that it will furnish the additional quantities of gas, the applicable Maximum Daily Quantity shall be increased to include such additional gas effective on the date the parties agree upon in the new Service Agreement prepared to reflect the new understanding. If the notice from Seller states it will not deliver the additional quantities of gas covered by Buyer's notice, the Maximum Daily Quantity shall remain unchanged.

For each large industrial use only customer covered by this Service Agreement, where Seller supplies to Buyer less than the entire requirements of gas for such industrial customer, Buyer shall, as nearly as practicable, receive gas hereunder at the same hourly and daily load factor as that at which Buyer delivers to such industrial customer.

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE IV
Price

All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule(s) _____, or any effective superseding rate schedules, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof.

ARTICLE V
Term

This agreement shall become effective on _____ and shall continue and remain in force and effect for a period

ARTICLE VI
Modification

No modification of the terms and provisions of this Service Agreement shall be or become effective except by the execution of a superseding Service Agreement.

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE VII
Subject Headings

The subject headings of the Articles of this agreement are inserted for convenient reference and are not to be considered in any interpretation of same.

ARTICLE VIII
Agreements Being Superseded

This agreement supersedes, cancels and terminates, as of the effective date of the term of this Service Agreement the following existing arrangements, agreements, contracts and Service Agreements with respect to the sale of natural gas by Seller to Buyer for the purposes set forth in Article I hereof:

Both parties shall be released from any and all obligations under said arrangements, agreements, contracts and Service Agreements except as to the obligation of Buyer to pay for all gas delivered thereunder by Seller prior to the effective date of the term of this Service Agreement, and for which payment has not been made.

ARTICLE IX
Change of Ownership

If all or any part of Buyer's distribution system or systems into which the gas sold hereunder is received, are voluntarily sold or exchanged by Buyer, then, and in such event, Buyer agrees that it will cause the person, firm or corporation so acquiring such facilities to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement, and Buyer further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

SERVICE AGREEMENT - FORM B
(Continued)

ARTICLE IX
Change of Ownership
(Continued)

If all or any part of Seller's pipe line system through which the gas sold hereunder is delivered to Buyer is voluntarily sold or exchanged by Seller and Seller will thereby be rendered unable to supply to Buyer any gas which it is obligated to supply hereunder, then, and in such event, Seller agrees that it will cause the person, firm or corporation so acquiring such property to take and hold the same subject to this agreement and subject to the obligation to fully and faithfully perform all of the obligations created by this agreement applicable to the property so sold or exchanged, and Seller further agrees that it will incorporate appropriate covenants to this effect in any act of conveyance or instrument of transfer which may be executed by it.

ARTICLE X
Successors and Assigns

This agreement shall be binding upon and inure to the benefit of the successors and assigns of each of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate originals.

_____
(Buyer)

By_____
(Title)

ATTEST:

_____

UNITED GAS PIPE LINE COMPANY

By_____
Vice President

ATTEST:

_____
Secretary

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FILED
SEP 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 520

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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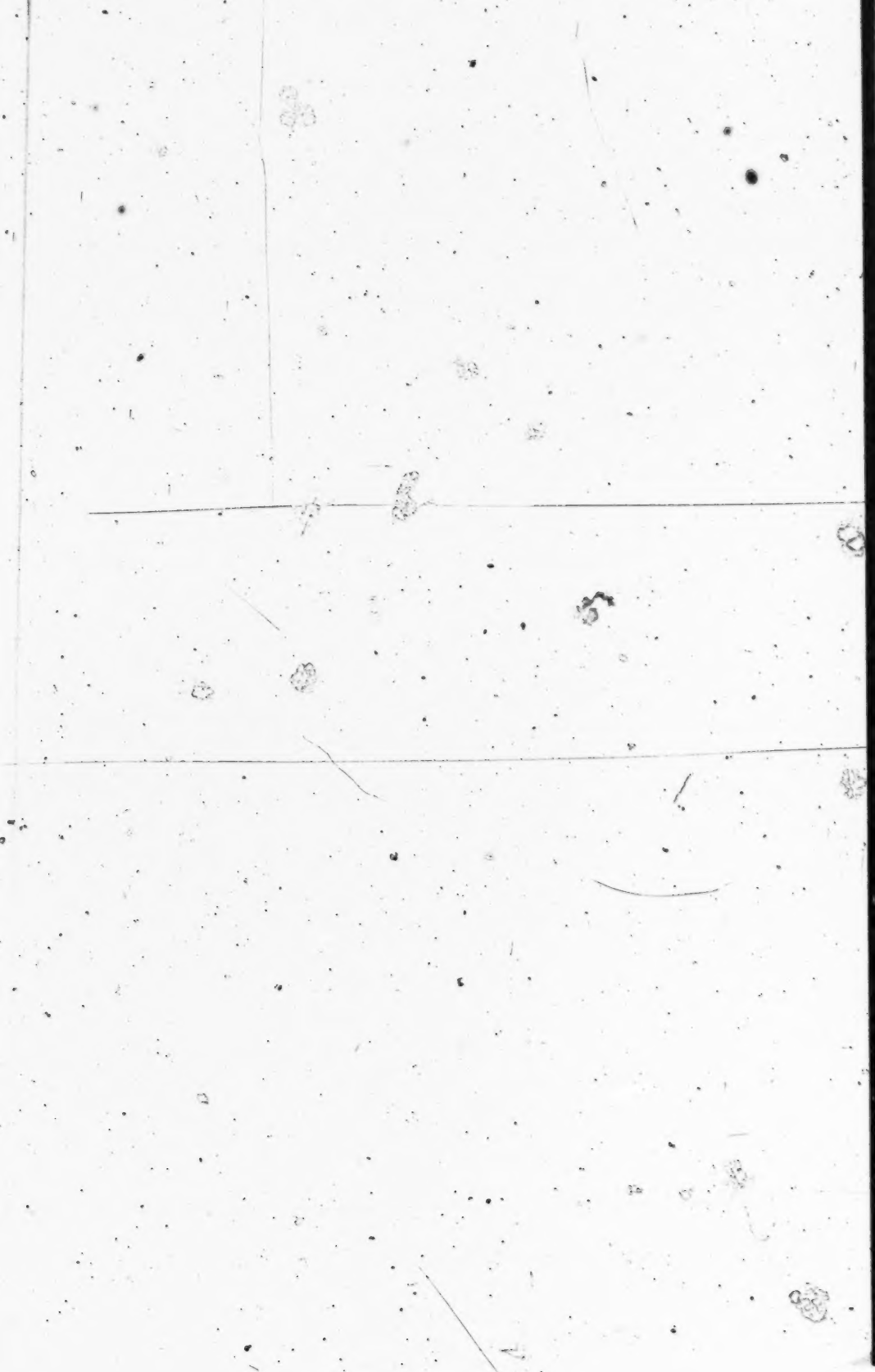
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IN THE

Supreme Court of the United States

October Term, 1957

No. .....

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 1, 1957 (App. 11),[1] reversing judgment and decision of Respondent Federal Power Commission[2] entered in Dockets G-1142, G-2210, G-9547, and G-10592 against Tyler Gas and City (App. 12), and ordering the Commission to order refunds by Petitioner to Tyler Gas of amounts collected under filed rates at Docket G-2210, and to reject a filing by Petitioner

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[1] The record certified from the Court below will be referred to as R; the Appendix to this Petition as App.

[2] Respondent Federal Power Commission will be referred to hereafter as the Commission; Tyler Gas Service Company will be hereafter referred to as Tyler Gas; City of Tyler, Texas, will be referred to hereafter as City.

of notice of increased rates to Tyler Gas at Docket G-9547 and G-10592, all filed under Section 4(d) of the Natural Gas Act.[3]

OPINION BELOW

The Commission issued an order containing its Opinion and Conclusions (App. 12). The Opinion of the Court (not yet reported) styled *Tyler Gas Service Company, et al* v. *Federal Power Commission, et al,* is contained in the Appendix filed herewith (p. 1 to 9).

JURISDICTION

The judgment of the Court of Appeals was entered August 1, 1957 (App. 11). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Urged as reasons for granting petition

1. May a Court of Appeals, in a review under Section 19(b) of the Natural Gas Act, reject and ignore the plain, clear holdings of a second Court of Appeals affirming a district court judgment and by "construction" effect a reversal and rendition of such judgments to the contrary of their plain, clear adjudication, and thereupon reverse an order of the Federal Power Commission holding such judgments as originally rendered to be res judicata of claims asserted by an applicant to said Commission?

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[3] 52 Stat. 821, c. 556, Act of June 21, 1938, as amended; 15 USC 717-717w; hereafter referred to as the Act.

2. May a Court of Appeals, in a review under Section 19(b) of the Natural Gas Act, revise, contrary to its plain, clear meaning, the final unappealed judgment of a second Court of Appeals in such way as to relieve and release the party cast by the judgment of the second Court of Appeals of and from the onus of such unappealed judgment and then to accord to such party, so released, the protection of a contrary decision of the Supreme Court of the United States in another case rendered subsequently to the final unrevised unappealed judgment of the second Court of Appeals?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21; 1938, Chapter 556, 52 Stat. 821, as amended, 15 U.S.C. 717, et seq) are set forth in the Appendix filed herewith (p. 50 to 57).

STATEMENT

THE PROCEEDING BEFORE THE FEDERAL POWER COMMISSION

Petitioner, a natural gas company subject to Commission regulation under the Act, filed as a rate schedule the common law contract with Tyler Gas dated November 22, 1940, numbered FPC Rate Schedule No. 42, as amended (R. 2-20). The Commission order permitting the filing (R. 66) permitted only the rate schedules to be filed as effective, adding in Paragraph (C) the caveat that nothing in the order "shall • • • be construed as constituting approval by this Commission of any rate, *provision or condition contained in the contract* • • • ".[4] Supplements No. 4 and 5 dated

May 21 and 29, 1946 (R. 12, 17) amended the rates under circumstances set out in C.A. 1662[5] by the District Court (R. 123, et seq, App. 28 et seq); by the Fifth Circuit (p. 75, FN 3, App. 41); repeated in part from the *same exhibits* by the Court below (App. 2-3). The Commission again (R. 322) approved for filing only the rate schedules, ordering again " • • • *nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;* • • • " (R. 322-3).

Commission Order 144 (18 CFR 154.1-154.85) promulgated regulations, having force of statutes, strictly dictating the form, composition and content of tariffs, and requiring conversion of contracts, filed as rate schedules, to a tariff form containing two distinct parts: One, a Service Agreement (Section 154.40, App. 60), or retention of those portions of a filed, executed contract as an executed Service Agreement, which would equate the directed content of the Service Agreement (Section 154.85, App. 60).[6] Secondly, a rate schedule defined (Section 154.11, App. 58) as meaning the statement of rate or charge for each classification or sale, and all terms and conditions, etc., affecting such rate or charge, the content of which was strictly and narrowly prescribed (Section 154.38, 154.39, App. 58-60). Section 154.38 (d) (3) made retention of Supplements 4 and 5,

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[4] All emphasis herein is supplied, unless otherwise noted.

[5] *Tyler Gas Service Company and City of Tyler, Texas,* v. *United Gas Pipe Line Company,* C.A. 1662, in the United States District Court for the Eastern District of Texas, Tyler Division, Opinion by District Judge (R. 122-133, App. 27 to 36), affirmed by the United States Court of Appeals for the Fifth Circuit, Opinion reported 217 F.2d 73 (App. 39 to 46), certiorari not sought.

[6] The Regulations promulgated by Order 144 were held validly issued under Sections 4(c) and 16 of the Act, *United Gas Pipe Line Company* v. *Federal Power Commission* (1950, D.C. Cir.) 181 F. 2d 796, cert. den. 340 U.S. 827.

supra, impossible and unlawful. Section 154.21 enjoined unconditional obedience to the effective tariff, i.e., that tariff permitted to be filed as effective under Order 144.

On July 3, 1952, at Docket G-2019, Petitioner filed its Conversion Tariff pursuant to Order 144 (R. 21-33). Simultaneously it filed the Section 154.85 (R. 2) Statement listing those portions (from the original contract and Supplement 3 only), which equated Service Agreement content required by Section 154.40. *No part of Supplements 4 or 5 (R. 12, 17), which the Court below adjudged control rates and service to Tyler Gas, was retained.*

The Conversion Tariff changed both rate form and level applicable to Tyler Gas. It reduced domestic gas rate from 12¢ (R. 13) to 11.2¢ (R. 21), or 6⅔%. It increased the rate for industrial resale gas from 7.2¢ (R. 18) to 7.5¢ (R. 22), or 4.1%. In addition, its definition of "industrial gas",[7] applicable to all industrial rates in the tariff, reclassified a substantial volume of gas sold to Tyler Gas from industrial to domestic, thereby making the higher domestic gas rate applicable to that volume. The parties disagreed on the dollar amount of the changes; the Court declared lack of interest (App. 6, FN 2).

On July 16, 1952, Tyler Gas filed with the Commission a written protest (R. 307-10) to the Conversion Tariff, asserting, inter alia, that it increased rates in violation of the 1946 contracts whose rates were not subject to change during the remainder of the term [to July 25, 1962]; had not been consented or agreed to by Tyler Gas; would breach and abrogate said contract if permitted to become effective; and contained other terms inconsistent with the contract

[7] United's IND schedules are applicable to sales for "Large Volume Industrial Use Only." That term is defined in the General Terms and Conditions to mean "gas delivered * * * to Buyer for resale to those customers of Buyer to whom Buyer sells gas for industrial use only in respective amounts exceeding, or estimated to exceed, 200,000 Mcf per year" (R. 25, 40).

which, if sanctioned, would abrogate the existing contract pro tanto. On July 31, 1952, the Commission ordered the Conversion Tariff filed (R. 311-17), including sheets applicable to Tyler Gas. Thereby, the Commission denied the objections of Tyler Gas, which did not appeal (Section 19(b), Act). *Thereby, the Conversion Tariff replaced and superseded the contract.* Since, no service has been rendered pursuant to said contract.

On June 24, 1953, (Docket G-2210), United filed notice of increased rates to Town Borders, including Tyler Gas (R. 80, 35, 38), which the Commission suspended for the statutory five months (Section 4(e)), and consolidated with Docket G-1142, a Section 5(a) investigation of all Petitioner's rates (R. 83-5) instituted in 1948 (R. 77-8). Tyler Gas and City in sworn applications to intervene admitted that Tyler Gas purchased *solely* under rate schedules of the Conversion Tariff (R. 72, 75). No *Mobile*[8] type objection was raised, but Commission jurisdiction was denied on the claim gas purchased was intrastate gas (R. 73).

On December 8, 1953, Tyler Gas and City sued Petitioner in C.A. 1662 (See FN 5) to enjoin filing of a Section 4(e) motion making increased rates of G-2210 effective; for declaratory judgment that the contract, as amended by Supplements 4 and 5 in 1946, was valid and subsisting; for mandatory injunction to compel specific performance of such contract as amended; and for permanent injunction against any filing pursuant to the Act of rates different from those in the 1946 Supplements 4 and 5 (R. 243-269). The same verified complaint (Section X, R. 257) declared the Conversion Tariff altered the contract rates; was made effective over opposition and protest by Tyler Gas that it

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[8] *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation* (1956) 350 U.S. 332.

violated such contract; that it had not acquiesced or consented to such change; and that payments thereunder were made under protest. Petitioner moved (a) to dismiss for want of jurisdiction, (b) to dismiss for failure to state a claim upon which relief could be granted (accurately condensed by the Fifth Circuit, App. 40-1), and (c) answer on the merits (R. 270-327). On preliminary injunction hearing, Tyler Gas and City advanced the complaint as the application; United, its motions and answer in opposition.

The District Court found against Tyler Gas and City and in favor of Petitioner (R. 122-133, App. 27-36), holding, inter alia, (a) jurisdiction existed; (b) the Conversion Tariff superseded the contract upon Commission denial and rejection of the written protest of Tyler Gas (p. 5-6, infra), upon identical grounds asserted in the complaint, that Tyler Gas failed to appeal under Section 19(b), so that the "contract" had not been in force for some several months; (c) the bill stated no equity because (1) the contract was unenforceable, being wholly inferior to the Act, particularly to the rights, duties, obligations and procedures imposed and conferred by the Act on Petitioner and the Commission, (2) that the contract constituted no impediment to, nor created estoppel against, Petitioner's filing with the Commission, pursuant to Section 4, a schedule of rates to meet the requirement of the Act for just and reasonable rates, and (3) that the filing (Docket G-2210) was not unilateral action by Petitioner in disregard of its contract rates, but was a following of statutory procedure in accordance with the statutory scheme; (d) that in a rate filing pursuant to Section 4, the Commission was amply empowered to give adequate relief; (e) that there was neither contract nor estoppel in favor of City. So deciding, the District Court denied injunction and dismissed the suit on the merits (R. 133-4).

The Fifth Circuit affirmed in a strong opinion (App. 39, 46), holding, inter alia, to grant the relief sought would be in defiance of the Act, and particularly Section 4; and expressly approved the holding that filing of increased rates at Docket G-2210 was not unilateral but lawful, because in accordance with the statutory scheme. Upon failure to seek certiorari from this Court, both judgments and decisions became final in February, 1955 — *one year before Mobile.*

The G-2210 rates, made effective by Section 4(e) motion, applied until superseded by the Section 5(a) rates of Docket G-1142 ordered by Commission Opinion 277 (13 FPC ....., R. 77-102). Opinion 277 approved agreement upon a cost of service and rate structure prepared by the Commission's Staff. Tyler Gas accepted Staff figures, subject to outcome of its appeal in C.A. 1662 then pending in the Fifth Circuit (R. 84, 94-5; Orders (A), (B), (C), (I), (O)(b), R. 97, 98, 99, 101). Rates filed at G-2210 were disallowed (Finding 2, R. 96; Order (A), R. 97); refund was ordered ((D) R. 98), paid to and accepted by Tyler Gas (App. 48, 49).

Service was rendered by Petitioner, paid for by Tyler Gas, solely under applicable rate schedules contained in the Conversion Tariff. Upon the effective date of the Section 5(a), G-1142, Opinion 277 rates, service was had and paid for only by virtue of rate schedules filed pursuant to Commission order and the General Terms and Conditions (R. 39-64), which integrally contained forms of Service Agreement (Conversion Tariff, R. 363, 371, G-1142, First Revised Volume p. 375, 385), imported into the rate schedules. Each of these (R. 366, 374; 378, 387) provided that the gas delivered should be paid for by buyer under the rate schedule (specifically described) "or any effective superseding rate schedules, on file with the Federal Power Com-

mission". The noticed changes occurring after the filing of the Conversion Tariff (the G-1142 rates, G-9547 and G-10592) were covered by and filed pursuant to such language and are consonant with the judgments and decisions of both Courts in C.A. 1662, and the necessary effect thereof.

Opinion 277 rates were superseded by those filed at Docket G-9547 (R. 337-8), and subsequently by those at Docket G-10592 (R. 338).

After this Court's decision in *Mobile, supra,* on February 27, 1956, Tyler Gas and City, seeking escape from the adverse final judgments in C.A. 1662, sought re-litigation through the device of Motion for Refund at Docket G-2210, filed May 15, 1956, (R. 142, et seq) (though full refund ordered by the Commission at G-2210 had been paid, App. 48, 49), and motions to reject the applicable filing at Dockets G-9547 (R. 105) and G-10592 (R. 213). All motions relied upon *Mobile.* Petitioner answered each (G-1142, G-2210, R. 164; G-9547, R. 135, 237; G-10592, R. 221), contending *Mobile* was not applicable and relying upon the Commission order denying protest to the Conversion Tariff and the judgments and decisions in C.A. 1662 as res adjudicata that the contract was superseded by the Conversion Tariff and ineffective; and at law was no impediment or bar to the right, duty, and obligation of Petitioner to file change of rates pursuant to Section 4(d), in order to comply with the Act.

By Opinion 294 (R. 404, App. 12), the Commission sustained Petitioner's position upon the integrity and bar of the judgments and decisions in C.A. 1662, and of its order.

THE JUDGMENT OF THE COURT OF APPEALS

Tyler Gas and City filed a petition for review under Section 19(b) of the Act to set aside the Commission's order (R. 391). The Commission appeared in defense of its

order. Petitioner, upon motion (R. 420), was allowed to intervene in support of Commission's Order (R. 438).

On August 1, 1957, the Court of Appeals in an opinion written by Judge Bastian (JJ. Bazelon and Washington concurring) set aside the Commission's order rejecting the several motions of Tyler Gas and City for refund and for rejection of filings of rate schedules (R. 439). The Court held that *Mobile* was not distinguishable from this cause; and that the judgment of the Fifth Circuit in C.A. 1662 was not res judicata

REASONS FOR GRANTING WRIT

The Court posed two questions: First, whether this case is distinguishable from *Mobile;* secondly, whether the judgment of the Fifth Circuit in C.A. 1662 was res judicata. It ignored the holding and adjudication of the Fifth Circuit, and by "construction", considered, as though originally presented, the issues determined by the Fifth Circuit reaching a decision contrary to the clear holding of that Court. Thereby its decision is in irreconciliable conflict with that which the Fifth Circuit adjudicated.

Having thus by "construction" nullified the holding of the Fifth Circuit, it denied res judicata and declared the case indistinguishable from *Mobile.*

In these conclusions the Court, in effect, without being empowered thereto, exercised a revisory power over the Fifth Circuit decision, appellate in character.

In addition, the decision is squarely in conflict with the long settled policy and declarations by this Court, and other Courts, including the Court below, which forbids resurrection of issues actually interred by judgment, and declares

that the same issues shall not be re-litigated between the same parties, including issues which might have been urged.[9]

In denying res judicata to the Commission order permitting the Conversion Tariff to be filed, it equally conflicts with settled, well considered decisions applying the same legal doctrine to orders of administrative agencies.[10]

The applicable decisions of this Court uniformly declare that where a judgment, however erroneous and however certain its reversal would be upon appeal, is permitted to become final without appeal, such is conclusive between the parties. Petitioner suggests that the decision below is not consonant with, but in denial of, such decisions of this Court, for it has effect to reverse and render the decision of the Fifth Circuit and declares a result claimed to accord with the rule of *Mobile* decided by this Court more than a year after the Fifth Circuit judgment became final, and thereby has effect to release Tyler Gas and City from the onus of an adverse judgment rendered by the Court of their selection and at their instance.

I.

The most sweeping part of the decision is that which holds that the judgment rendered in C.A. 1662 was merely one of dismissal for lack of jurisdiction, and not a determination upon the merits. The Court reasoned that since the

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[9] *Brownell* v. *Chase National Bank, et al* (1956) 352 U.S. 36; *Angel* v. *Bullington* (1947) 330 U.S. 183; *United States* v. *Munsingwear* (1950) 340 U.S. 36; *Woods* v. *Cannaday* (1946) 81 App. D.C. 281, 158 F. 2d. 184; *United States* v. *New York Terminal Warehouse Company* (5 Cir. 1956) 233 F. 2d. 238; *United States ex rel Donner Steel Co. Inc.* v. *I.C.C.* (1925) 56 App. D.C. 44, 8 F. 2d. 905; *Wheat* v. *Texas Land & Mtg. Co.* (5 Cir. 1945) 153 F. 2d. 926, cert. den. 328 U.S. 837; *Crowell* v. *Baker Oil Tools, Inc.* (5 Cir. 1947) 164 F. 2d. 487, cert. den. 333 U.S. 880; *Foster* v. *Wells* (1849, S. Ct. Texas) 4 Tex. 101; *Commonwealth of Massachusetts* v. *Davis* (1942) 168 SW 2d 216, 140 Tex. 398, cert. den. 320 U.S. 210.

[10] *Sunshine Anthracite Coal Co.* v. *Adkins* (1940) 310 U.S. 381; *Otis & Co.* v. *Securities & Exchange Commission* (1949, D.C. Cir.) 176 F. 2d 34, reversed on other grounds 338 U.S. 843; *George H. Lee* v. *Federal Trade Commission* (1940 8 Cir.) 113 F. 2d 583; *United States* v. *Willard Tablet Co.* (1944, 7 Cir.) 141 F. 2d. 141.

Courts in C.A. 1662 held that the Commission was "amply empowered to give adequate relief," such merely declared primary jurisdiction and thus could not be res judicata on the merits of the Commission's later action, though its clear duty obligated it to exonerate such judgments to prevent Tyler Gas and City from asserting claims denied by such Courts constitutionally empowered so to adjudge.

In C.A. 1662 Tyler Gas and City sought (1) to enjoin filing of a motion under Section 4(e) to put increased rates into effect; (2) a declaratory judgment the contract was valid and subsisting; and (3) for mandatory injunction to compel specific performance of the contract and to prevent any filing to the Commission under the Act contrary thereto. These matters were solely addressed to the equity jurisdiction of the Court. The Commission can neither consider nor grant injunctory pleas, nor equitable petitions for specific performance, whether by injunction or otherwise. With deference Petitioner submits that it is sophistry to say that the Fifth Circuit judgment merely was that the Commission alone could decide the issues Tyler Gas posed. The Commission cannot even enforce its decisions, properly made within the sphere of its authority, but must file enforcement proceedings with the proper District Court in accordance with Section 20 of the Act.

The District Court in C.A. 1662 denied a challenge to its jurisdiction, affirmed by the Fifth Circuit, and expressly declared jurisdiction of subject matter and parties (R. 133, App. 37).

The Fifth Circuit in a per curiam opinion denying Petitioner's Motion to Dismiss the appeal for mootness held:

> " • • • we are in no doubt: that it is an appeal from a final judgment *determining the case on the merits* against appellant the correctness of which appellant

has a right to have this court determine; * * * *" (R. 361).

"Correctness" was declared, a determination having no odor of lack of jurisdiction to decide.

Tyler Gas and City by C.A. 1662 asserted contract rights of overriding superiority to statutory procedure under the Act. In determining that there was a want of equity requiring denial of such claims, the District Court in an opinion imported into its judgment as Findings of Fact and Conclusions of Law, affirmed by the Fifth Circuit (R. 133, 122, App. 37, 27), held, inter alia:

1. That Tyler gas protested, did not consent to the contract rate change worked by the Conversion Tariff, did not seek judicial review under Section 19 of the Act (R. 126-7, App. 30) of the Commission order (R. 311), which "allowed" the Conversion Tariff to become effective so that its rates, though a departure from the contracts, were "lawful" rates solely by the Commission order, whereby the contract provisions purporting to fix rates over a long period in the future "and upon which Plaintiffs [Tyler Gas, City] based their claim for equitable relief have not been in effect for a matter of several months" (R. 131, App. 35).

Yet the Court below, while admitting that Order 144 "was not the result of independent action", i.e., agreement between Petitioner, Tyler Gas, or City, and that the Conversion Tariff effected change in rate level and form (R. 441, App. 3), nevertheless reversed and rendered, holding that Tyler Gas had "acquiesced" in the Conversion Tariff and its change in the contract rates (R. 444, App. 6). This is in the teeth of, and without support in, the record. It ignored the sworn pleading of Tyler Gas and City denying

acquiescence (R. 257), and further ignored and wrongfully refused the adjudicated res judicata from denial of the written protest and failure to appeal.

While conceding no "independent action", i.e., agreement, the Court also reversed and rendered the adjudication that the contract had not been in effect for several months prior to C.A. 1662 by adjudging that the Conversion Tariff became "a part of an unchanged contract" and cited *Mobile*. But the *Mobile* holding was based on assent, the Third Circuit, additionally, noting a distinction from *Tyler Gas*, because the contract had already been modified in an adversary proceeding.[11] (215 F. 2d, FN 3 at p. 885). The Court had no power thus involuntarily to revive the contracts the Fifth Circuit had three years before adjudged long dead, then to make for the parties a contract of amendment. Petitioner never so authorized, nor consents.

Tyler Gas had branded approval of the Conversion Tariff as contract abrogation. The Court below thus was not warranted in relying upon *Mobile*, for here there was want of assent to contract modification.

2. "It is abundantly clear the United may not by private contract fix binding long-term future rates with its customers. * * * compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise

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11 Mobile's petition to review in the Third Circuit alleged that the percentage rates in the contract resulted in payments "at an actual rate of 10.7¢ per Mcf", and that these percentage rates were replaced with the Conversion Tariff "* * * which substituted a flat rate of 10.7¢ per Mcf for gas sold to Mobile for resale to Ideal" (Tr. of R. in the U.S.S. Ct. No. 436, October Term, 1954, p. 49). The Third Circuit (Fn. 16, p. 891) said "There is no contention that the instant contract was changed by the Conversion Order replacing the percentage rate by the fixed rate. The latter, as has been mentioned, was substantially the same as the old percentage rate and inferentially became a part of the unchanged contract." In its brief in this Court, Mobile said (Br. 4) that the Conversion Tariff "provided that sales to Mobile for resale to Ideal would be at a flat rate of 10.7¢ per Mcf. which was *precisely* the amount of return which it had previously received under the pre-existing percentage rate."

to a cause of action in favor of the other, either for money damages (Miss. Power & Light Co. v. Memphis Natural Gas Co. (162 Fed. (2d) 388) or for specific performance (Mich. Consol. Gas Co. v. Panhandle Pipe Line Co., 173 Fed. (2d) 784). (R. 128, 129; App. 32, 33).

"So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any *suggested* rate is just and reasonable — and hence lawful — is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates" (R. 128-9; App. 33).

Even though the Court below considered this contrary to the later holding of this Court in *Mobile*, such adjudication, affirmed by the Fifth Circuit and *unappealed to this Court*, may not be ignored and denied by the Court below as mere "comments".

3. That United's action in filing increased rates at Docket G-2210 in the face of the claimed contract was not "unilateral", because in accordance with the statutory scheme (R. 130, App. 34).

The Court below in the face of this plain holding, expressly approved by the Fifth Circuit (217 F. 2d 78, App. 39) proclaimed the filings at Dockets G-2210, G-9547, and G-10592 "unilateral". Having destroyed efficacy of that judgment, it declared the filings interdicted by *Mobile*.

4. That the "new rates" of G-2210 became the lawful ones by virtue of the Commission order, so that the contract provision for future rates was superseded. During the time when the contract rates

> " • • • were in fact the lawful ones, they became lawful not simply because the parties had agreed thereto. Such rates received their vitality and breath of life from the fact that the Commission permitted such contract to be filed, and ordered such rates into effect until further notice. By the order which accomplished this result (Plaintiff's Exh. 19) [R. 322] the Commission was careful to provide that such actions should not 'be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate' " (R. 131, App. 35).

If this be "comment", its statement by a court was dispositive of suit claims — ignored by the Court below.

5. The District Court held that since it should not restrain Petitioner from taking the initial step in bringing the matter before the Commission for review, it should not restrain any successive steps, and in respect of the filing held that the Commission was amply empowered to give adequate relief on the proposed rates (R. 130-1, App. 34-5). Its holding negated right or issue requiring consideration of "contract rights".

The Fifth Circuit, affirming the holdings listed, concluded jurisdiction was correctly affirmed; that United "cannot" by private contract "fix binding long-term future contracts". It defined the basic position of Tyler Gas and City as contained in eight Specifications of Error (FN 4, p. 76, App. 43), "which ring the changes on what it claims is the fundamental error of the trial court, attack its holdings that a public utility company may, by the simple expedient of filing a revised schedule with the Federal Power Com-

mission, without a full hearing before and a finding by the Commission that such contract rates are unjust, unreasonable, or unlawful, disregard its solemn contracts fixing maximum rates" (p. 76, App. 43-4), and by its opinion and decision denied these contentions. It reasoned that the District Court was correct, the Tyler Gas and City contentions wrong, because a freeze by contract, as they contended, "would be the result of action in contravention, if not in defiance of, the Natural Gas Act, and in particular Section 4 thereof and of the authority and jurisdiction of the Federal Power Commission" (p. 77, App. 45). It expressly held right the rejection of the prayer for a decree "requiring [Petitioner] to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding" (p. 78, App. 45). Finally, it declared that the District Court "correctly held that if he could, and should, restrain United from taking any of the preliminary steps provided by statute, he should, as Plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the Court cannot do" (p. 78, App. 46).

These holdings, while contrary to the holding of this Court in *Mobile*, became final, without appeal, more than a year before this Court's decision. The Court below was thus not justified in setting aside such judgment and substituting its own.

Furthermore, the dismissal was one with prejudice, so adjudication on the merits.[12] Dismissal for "want or failure of equity" was equally adjudication on merits.[13] So, too,

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[12] Rule 41b FRCP; *Slack* v. *Rich* (1950) 87 App. D.C. 123, 182 F. 2d 706; *Ross* v. *Ickes* (1942) 130 F. 2d 415, 76 App. D.C. 146; *Sardo* v. *McGrath* (1952) 196 F. 2d 20, 90 App. D.C. 195; *Holcomb* v. *Holcomb* (1954) 209 F. 2d. 794, 797, 93 App. D.C. 242; *American National Bank & Trust Co.* v. *U.S.* (1944) 142 F. 2d. 571, 79 App. D.C. 62; *Mooney* v. *Central Motor Lines* (6 Cir. 1955) 222 F. 2d 572.

[13] *Sacks* v. *Stecker* (2 Cir. 1932) 62 F. 2d 65)

dismissal in response to a motion under Rule 12(b) FRCP for failure to state a claim.[14] The Findings and Conclusions are available to define re-litigation, forbidden under the res judicata concept.[15]

The Courts in C.A. 1662 held the contract non-existent and superseded by the Conversion Tariff prepared and filed under compulsion of the Commission's Order 144. The Court below has held that order promulgated valid Regulations pursuant to Sections 4(c) and 16 of the Act. *United Gas Pipe Line Company* v. *Federal Power Commission* (1950) 181 F. 2d. 796, cert. den. 340 U.S. 827, whereby such Regulations have the force and effect of statutes. Service thus was rendered and paid for by Tyler Gas under rate schedules filed pursuant to said Regulations, not by contract. G-2210 filing was decreed valid subject to Commission review.

The Conversion Tariff rate schedules (R. 21, 23) integrated General Terms and Conditions containing Forms of Service Agreements. Thus Article V (R. 366) and Article IV (R. 374) provided:

> "All gas delivered hereunder shall be paid for by Buyer under Seller's rate schedule (schedule described), *or any effective superseding rate schedules on file with the Federal Power Commission.*"

The same provision was contained in the Form of Service Agreements likewise imported into the Revised Sheets filed as ordered by Opinion 277 (R. 378, 387). Service was received by Tyler Gas under these circumstances. The decision of the Courts in C.A. 1662 sanctioned such filings as controlling. Based thereon, the Commission in Opinion

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[14] *Daley* v. *Sears, Roebuck Co.* (1950, D.C.N.D. Ohio) 90 F.S. 562; *Mullen* v. *Fitz Simons & Connell Dredge and Dock Co.* (1948, 7 Cir.) 172 F. 2d 601, cert. den. 337 U.S. 959, Cf. *Wilson, Inc.* v. *F.C.C.* (1948) 83 App. D.C. 176, 170 F. 2d 793, 805.

[15] *Florasynth Laboratories, Inc.* v. *Goldberg* (7 Cir. 1951) 191 F. 2d 877.

294 correctly held that rate changes so effected were properly filed and distinguishable from *Mobile*. The Court below recently held language almost identical with that of such Service Agreements readily distinguishable from *Mobile*, because expressly contemplating future filings so that there was no unilateral change in rates fixed by contract.[16]

Upon consideration of the holdings in C.A. 1662, the Court below was not justified in reversing the Commission holding in Opinion 294 that such filings and changes effected after the Conversion Tariff were properly filed.

II.

Petitioner suggests that the Court of Appeals in the decision below repeated its dismissal of the Fifth Circuit decision expressed in its opinion in *Sierra Pacific Power Company* v. *Federal Power Commission* (1955), 223 F. 2d 605. There the Court said:

> "Cases relied on by the Commission do not sustain its position. *Tyler Gas Service Company* v. *United Gas Pipe Line Company* which the Commission asserts is inconsistent with the Mobile case, expressly withheld any opinion as to the correctness of that decision." (p. 609).

Wanting there, present here, was the judgment roll in C.A. 1662. The record here contains the Bill of Complaint and attached exhibits (R. 243), the motions and answer of Petitioner and exhibits attached (R. 270, et seq), the Opinion of the District Judge (R. 122, App. 27), the judgment of the District Court (R. 133, App. 37), citation of the Fifth Circuit opinion, the judgment of the Fifth Circuit (R. 134, App. 47). An over-all appraisal of the Court's

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[16] *Cincinnati Gas & Electric Company* v. *Federal Power Commission*, decided June 3, 1957, No. 13515, U.S.C.A., D.C. Cir. ... F. 2d ..., not yet published. See *Same* v. *Same*, No. 13557, decided June 20, 1957, by the same Court, ... F. 2d ..., not yet published.

opinion reasonably leads to the conclusion that it was persuaded to adhere to its prior reaction despite the inescapable fact that the judgment roll clearly discloses adjudications wholly consistent with, and requiring, the decision of the Commission in the order reviewed. A party may not be relieved of a final adverse judgment simply because the court of last resort subsequent to the finality of such judgment declared the law to be contrary to that decided. *Mobile* removed the Fifth Circuit decision from the authority of stare decises, but not from the compulsion of res judicata. This Court should take jurisdiction, and so declare.

CONCLUSION

It is accordingly urged that a Writ of Certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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No. 520

Supreme Court of the United States

October Term, 1957

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

TYLER GAS SERVICE COMPANY, CITY OF TYLER, TEXAS, FEDERAL POWER COMMISSION,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,623

TYLER GAS SERVICE COMPANY, and CITY OF TYLER, TEXAS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Decided August 1, 1957

Mr. Bryce Rea, Jr., and *Mr. Thomas B. Ramey* of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of court, with whom *Mr. Donald E. Cross* was on the brief, for petitioners.

Mr. Louis L. DaPra, Attorney, Federal Power Commission, of the bar of the Supreme Court of Indiana, *pro hac vice*, by special leave of court, with whom *Messrs. Willard W. Gatchell*, General counsel, Federal Power Commission, *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, and *W. Russell Gorman*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent.

Mr. Thomas Fletcher, with whom *Mr. C. Huffman Lewis* was on the brief, for intervenor.

Mr. William C. Chanler, with whom *Mr. Lawrence A. Baker* was on the brief, for McMurrey Refining Company, as *amicus curiae*, urging reversal.

Before BAZELON, WASHINGTON, and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This proceeding is to review an order of the Federal Power Commission (hereinafter called the Commission) denying a motion of Tyler Gas Service Company (hereinafter called Tyler Gas) for refund of sums paid to intervenor, United Gas Pipe Line Company (hereinafter called United), and two joint petitions by Tyler Gas and the City of Tyler to reject rate schedules filed by United to increase rates specified in a contract between Tyler Gas and United.

The record discloses that the franchise of Tyler Gas as distributor of natural gas for the City of Tyler was to expire in 1946. In that year, natural gas was in abundant supply in the vicinity of the City of Tyler, by reason of the proximity of a number of producing fields. As the expiration of the Tyler Gas franchise neared, a group of citizens appeared before the Tyler City Commission with the proposal that the franchise be not renewed, that a new distributing company be organized, which would procure its gas from new sources at a price less than Tyler Gas paid United, its supplier, and suggesting that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this proposal and, for a period of several months, had it under consideration.

Tyler Gas wished its franchise renewed, and United was anxious to retain this market for its product. After considerable negotiation, United consented to a reduction in price to Tyler Gas for domestic consumption, from 22½¢ to 12¢ per MCF, if the City of Tyler would renew the Tyler Gas franchise. A new franchise was prepared, specifying the rates to be charged consumers, the rates being predicated on a rate of 12¢ per MCF from United to Tyler Gas for domestic and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ per MCF for industrial gas.

On April 3, 1946, United addressed a letter to the City of Tyler wherein United agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years. In reliance on the representation of United, the proponents of the new and competing company withdrew the application for its franchise, the City of Tyler renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract between United and Tyler Gas was amended accordingly. The amended contract was to run until 1962.

By the Commission's Order No. 144, dated October 30, 1948, it was provided that existing rate schedules, which set forth rates in terms of percentages of receipts, should be replaced by schedules setting forth the rates in terms of dollars and cents per unit. This order was issued to bring all rates schedules in line insofar as terms of dollars and cents per unit were concerned, and was not the result of independent action on the part of United, Tyler Gas or the City of Tyler. On July 30, 1952, United filed with the Commission a so-called "conversion tariff," in accordance with Order No. 144.

The contract with Tyler Gas covered both industrial and domestic sales. The conversion tariff slightly increased the rate on industrial sales and decreased it on domestic sales, with a resultant small increase in the rates at that time being paid under the contract.

On June 24, 1953, United filed schedules of increased rates for both domestic and industrial gas and, on July 10, 1953, the Commission issued an order suspending the increased rates for five months, pending a hearing. This suspension did not apply to rates applicable to sales for industrial use only. Tyler Gas intervened in the proceedings and opposed the rates.

In December 1953, Tyler Gas and the City of Tyler filed a complaint with the United States District Court for the Eastern District of Texas, seeking a preliminary injunction to restrain United from putting its increases into effect, and for declaratory judgment declaring the contracts to be valid and existing. The District Court denied the application for preliminary injunction and, on motion of United, dismissed the complaint. The United States Court of Appeals for the Fifth Circuit affirmed. *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, 217 F. 2d 73 (1954).

During the pendency of the proceedings in the Fifth Circuit, hearings were held for the purpose of considering a proposal for settlement of United's schedule of general rate increases, and Tyler Gas requested that this settlement remain open for the determination of the issues raised in the petition to intervene by Tyler Gas. This was done.

Following the decision by the Supreme Court in the *Mobile* case,[1] Tyler Gas filed a motion for refund of the amounts United had been collecting pursuant to the order

[1] *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956).

of the Commission dated January 25, 1954, and later filed, jointly with the City of Tyler, petitions to reject two schedules for further rate increases filed by United subsequent to the January 25, 1954, order of the Commission. The Commission denied the motion and the joint petitions, holding that the *Mobile* case was not applicable and that Tyler Gas had no rights under its contract which, by its terms, ran until 1962. The basis of the Commission's decision was (1) that the case could be distinguished from the *Mobile* case, and (2) that the action of the Circuit Court of Appeals for the Fifth Circuit was *res judicata* insofar as Tyler Gas was concerned.

The questions presented on this appeal are two: first, is this case distinguishable from the *Mobile* case; and, second, was the judgment of the Fifth Circuit in the prior litigation *res judicata*? Our answer to both questions is in the negative.

Respondent's position that this case is distinguishable from *Mobile* is based on the contention that the United conversion tariff, filed pursuant to Commission Order No. 144, was a unilateral change in the contract rates as to Tyler Gas, and that from the time of that change the contract did not bar further unilateral increases in rates. Particular reliance is placed on the fact that the conversion tariff effected some upward change in the cost of natural gas supplied to Tyler Gas by United. From this, respondent argues that Tyler Gas had no binding contractual rights to any rate and that United, by filing with the Commission a higher rate schedule, could unilaterally increase the price of gas to Tyler Gas. This, it is said, makes inapplicable the decision in *Mobile*

that the Natural Gas Act, 15 U.S.C. § 717 (a) - (w) (in particular, § 4 (d)), confers no power to effect changes in contracts by unilateral action. According to respondent, at the time the rate increases were filed here there was no longer a right to obtain gas at any contract price.

In the *Mobile* case, United had a contract with Mobile to furnish gas for a certain industrial user at a certain percentage of the sale price paid Mobile by the user. Under Commission Order No. 144, United was directed to and did file a conversion tariff, which the Third Circuit found ". . . *almost* identical with the amount the Mobile percentage rate actually figured." [Emphasis supplied.] *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F. 2d 883, 884 (3d Cir. 1954), aff'd, 350 U.S. 332 (1956). Mobile acquiesced in the conversion tariff and was thereafter billed at and paid the conversion rate until United applied for an increase in its industrial rates and the Commission ordered the increased rate paid. It was this increased rate, absent a finding that the contract rate was in conflict with the public interest, which the Supreme Court ruled a nullity. This is exactly the case before us.

The fact that the conversion tariff acquiesced in by Tyler Gas slightly changed the cost to it, as compared to the original contract percentage rate, cannot distinguish this case from Mobile,[2] for there the converted tariff did not result in cost *identical* to that under the original contract. The Third Circuit, in the *Mobile* case, regarded the conversion tariff as becoming a part of an unchanged

[2] There is some disagreement between the parties as to the amount of the higher cost under the conversion tariff. Tyler Gas tells us it was a difference of $2,000.88, or 1%, while respondent claims the difference was $7,900.00, or 3%. The data to determine which figure, if either, is correct is not before us, even if we were interested in computing the difference.

contract. See 215 F. 2d at 891, n. 16. This is plainly right. The fact that Tyler Gas inferentially consented to a slightly higher cost of gas in the conversion tariff filed pursuant to Commission Order No. 144 is no basis for saying that it has agreed to be bound by later unilateral rate increases. Tyler Gas has never abandoned its contract; the contract has not been mutually rescinded. So long as Tyler Gas has a valid, subsisting contract with United, the cost of gas cannot be unilaterally varied unless the Commission first finds that the contract rate is in conflict with the public interest. The rules of the Commission itself support the view that modification of a contract does not abrogate it. This is clear from 18 C.F.R. § 154.85 (1949), which reads as follows:

"*Status of contracts filed as rate schedules and restated.*

Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: *Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: *Provided further, however,* That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff."

The Supreme Court has decided, in the *Mobile* case, that the Natural Gas Act does not permit unilateral changes in rate contracts. This is exactly what respondent has permitted to be done here. We can find no sound basis in fact or principle to distinguish this case from *Mobile*.

For the above reasons, we conclude that the answer to the first question presented in this case must be "No."

II

There is no occasion for lengthy comment as to our conclusion on the second question before us. A decision dismissing a complaint for lack of jurisdiction cannot be *res judicata* as to the substantive merits of the complaint. *Hughes* v. *United States*, 71 U.S. 232 (1866).

Our view of the decision in *Tyler Gas Service Co.* v. *United Gas Pipe Line Co.*, *supra*, is that dismissal of Tyler Gas' complaint was based on a lack of jurisdiction to grant equitable relief as to matters then pending before an administrative agency empowered to regulate natural gas rates, and to afford an adequate remedy. Whatever the purpose of the comments of the Fifth Circuit and the District Court on the merits of the action, we think that both quite properly decided the case on the basis of jurisdiction. The Fifth Circuit regarded the District Court's holding to be ". . . that plaintiffs must, therefore, seek such relief as they may be entitled to under the statute from the commission and not from the court." 217 F. 2d at 76. In its opinion (p. 77), the court stated: ". . . the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in

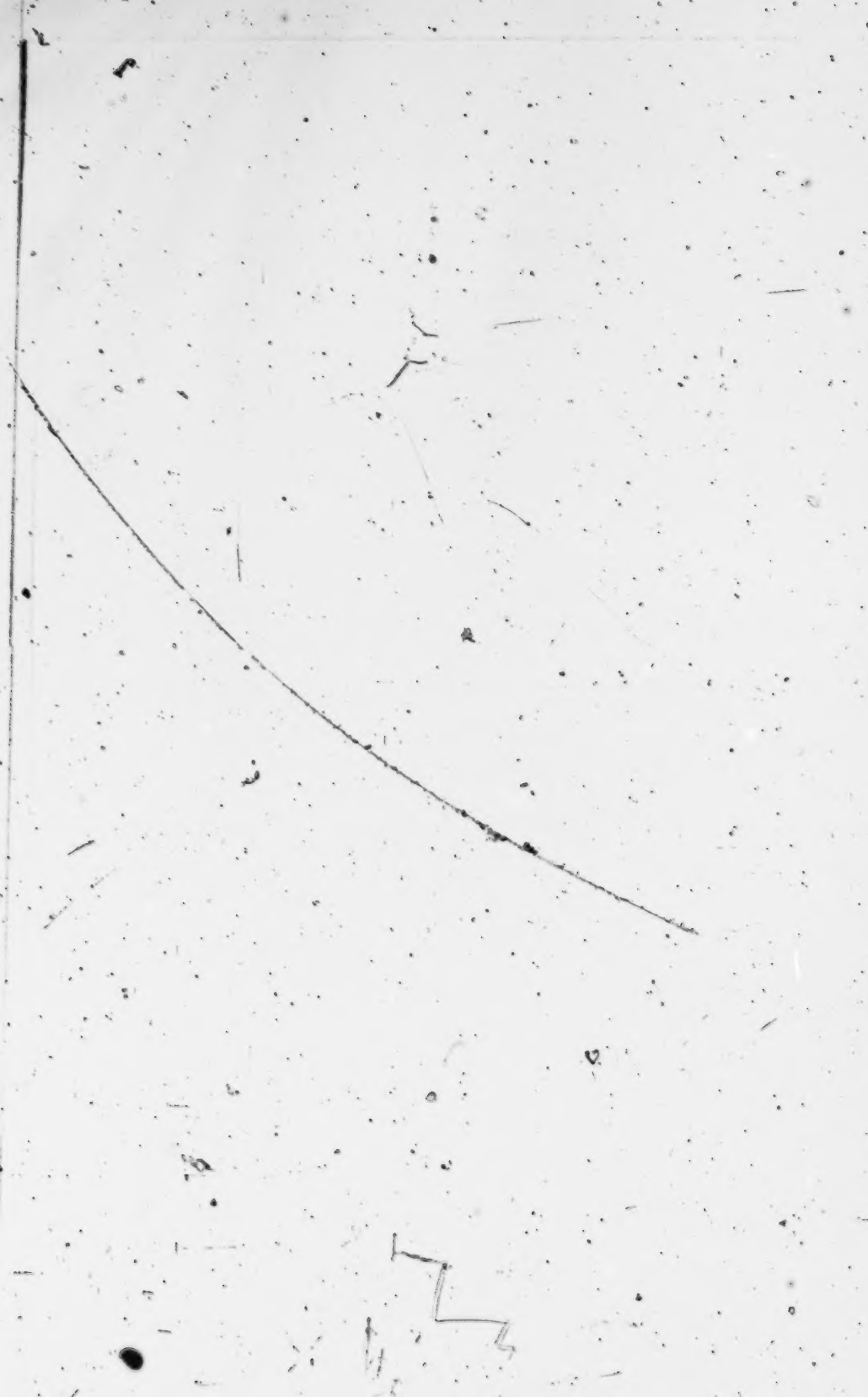
accordance with the Act." Later in its decision, the court recites:

> "Assuming without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong [in the *Mobile* case], we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that 'any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief . . .'"

We cannot see how a decision that a party must seek relief before an administrative agency can be *res judicata* of the merits of the agency's later denial of the relief requested.

The order denying the motion of Tyler Gas for refund is reversed. The order denying the petitions to reject the rate schedules filed by United are likewise reversed.

Because of the disposition we make of this case, no other matters briefed or argued need be discussed.



United States Court of Appeals
for the
District of Columbia Circuit
Filed August 1, 1957
JOSEPH W. STEWART
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,623
April Term, 1957

TYLER GAS SERVICE COMPANY and CITY OF TYLER, TEXAS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Before: Bazelon, Washington and Bastian, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of the Federal Power Commission on review in this case be, and they are hereby, reversed, and that this case be, and it is hereby, remanded to the said Federal Power Commission for further proceedings not inconsistent with the opinion of this Court.

Dated: August 1, 1957.

Per Curiam.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, *Chairman*; SEABORN L. DIGBY, FREDERICK STUECK, WILLIAM R. CONNOLE and ARTHUR KLINE.

In the Matters of	Docket Nos.
United Gas Pipe Line Company	G-1142, G-2210, G-9547 and G-10592

Opinion No. 294

OPINION AND ORDER DENYING MOTION FOR REFUND AND DENYING PETITIONS FOR REJECTION OF RATE FILINGS

(Issued October 2, 1956)

These are rate proceedings involving the rates charged by United Gas Pipe Line Company (United) to Tyler Gas Service Company (Tyler Gas) for natural-gas service rendered to it. The proceedings arise from rate increase proposals filed with the Commission. Specifically, they pertain to a motion filed on May 15, 1956, by Tyler Gas to require United to refund certain moneys collected pursuant to an undertaking to refund in Docket No. G-2210 and joint petitions filed on October 21, 1955, in Docket No. G-9547 and on June 15, 1956, in Docket No. G-10592 by Tyler Gas and the City of Tyler, Texas, seeking rejection of rate increase filings of United in those dockets. United opposes

the requests of Tyler Gas and the City of Tyler. Since the motion and the two petitions raise the same issue of the Commission's power under the Natural Gas Act (Act), we heard oral argument on all three together on July 13, 1956.

The motion and the joint petitions raise the primary question of the Commission's power to entertain the rate increase proposals filed by United in the three dockets without the consent of Tyler Gas. United defends the assertion of Commission power to accept the filing of changes in tariff rates and, in addition, in opposition to the motion for refunds, claims that the decision of the Court of Appeals for the Fifth Circuit in *Tyler Gas Service Company* v. *United Gas Pipe Line Company*, 217 F. 2d 73, bars Commission action granting refunds in Docket No. G-2210. We have carefully examined the contentions of the parties, including the argument by Tyler Gas and the City of Tyler that the decision of the United States Supreme Court in the *Mobile* case[1] requires us to take the action requested by them. We conclude that none of the filings in Docket Nos. G-2210, G-9547 or G-10592 is governed by the *Mobile* case; that the *ex parte* filings of tariff rates by United were properly made in pursuance to the Commission's regulations and the provisions of the Natural Gas Act; and that the motion and the joint petitions must be denied. Additionally, with respect to the motion for refunds in Docket No. G-2210, we conclude that the decision of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court constitutes a bar to relitigation of the issues which were raised, or might have been raised, by Tyler Gas in that proceeding.

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[1] *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332.

A brief resume of the history of the rate proceedings involving Tyler Gas and United will aid in understanding our decision herein. The original contract between United and Tyler Gas, entered into on November 22, 1940, provided for a rate of 22.5¢ per Mcf for gas to be resold for domestic use. For gas to be resold for industrial use only, United received 80% of the proceeds received by Tyler Gas from the industrial sales, but not less than 16¢ per Mcf. In accordance with the Commission's General Rules and Regulations effective at that time, the contract was filed by United on January 3, 1941, and by order of February 12, 1941, the Commission permitted the contract to become effective as United's FPC Gas Rate Schedule No. 42.

Service was rendered under this contract, with amendments not significant here, until 1946 when, pursuant to agreement between the parties, the contract was revised to provide for a substantial reduction in rates. Under the amended contract, filed as Supplements Nos. 3 and 4 to United's FPC Gas Rate Schedule No. 42 and effective as of May 10, 1946, the rate for resale for domestic use was reduced to 12¢ per Mcf and the rate for resale for industrial use only, stated in terms of 80% of the proceeds received by Tyler Gas for those sales, was likewise reduced so that the minimum to be received by United was 7.2¢ per Mcf. The term of the amended contract was 16 years.

From May 10, 1946, until August 3, 1952, United rendered service to Tyler Gas pursuant to the amended contract. On July 3, 1952, United filed its proposed conversion tariff, submitted in compliance with the Commission's Order No. 144, Docket No. R-107. Among other things, the conversion tariff (United's FPC Gas Tariff, Original Volume No. 1) which became effective for service rendered to Tyler Gas on August 3, 1952, changed the rates for the sale of gas to Tyler Gas. The rate for resale for domestic use was reduced

to 11.2¢ and the minimum rate for resale for industrial use only was increased to 7.5¢. In over-all effect the dollar amount paid by Tyler Gas to United was increased approximately $7,900 annually. Tyler Gas filed a letter protesting the filing. However, Tyler Gas did not petition to intervene in the proceeding nor seek review of the Commission's order permitting the conversion tariff to become effective as to sales to Tyler Gas. Hence, the order became final and binding upon Tyler Gas.

At this point the purpose and effect of the conversion tariff should be made clear. In issuing Order No. 144 in Docket No. R-107 on October 30, 1948, we required all natural-gas companies to convert their contracts filed as rate schedules into tariff form. We recognized that prior to the passage of the Natural Gas Act natural-gas companies had no rate schedules generally applicable to stated classes of service. The prevailing practice was to sell natural gas under individual contracts arrived at after extensive negotiations between the parties. These contracts varied greatly in form and content but to expedite the establishment of legal rates at the inception of regulation under the Natural Gas Act we permitted natural-gas companies to file their contracts as rate schedules. Amendments to the rate contracts filed as supplements to the rate schedules complicated matters further.

Prior to World War II we undertook to revise this cumbersome method of filing which resulted not only in administrative inefficiency but also in possible discrimination among customers. However, before we could institute a uniform procedure, the war and consequent lack of manpower intervened. Later, through informal cooperation between many natural-gas companies and the Commission's Staff, whereby the natural-gas companies converted from contract to tariff rates, the efficacy of the tariff procedure

was proven. Therefore, we issued our Order No. 144 revising our General Rules and Regulations to require the filing of tariffs in place of the myriad of contracts on file as rate schedules.

An FPC gas tariff filed in pursuance to Order No. 144 contains in one volume all information pertinent to jurisdictional service rendered by the natural-gas company. First, there are set forth the rate schedules for all classes of service (an index of purchasers identifying the rate schedules under which each buys gas is contained at the end of the volume). Following the rate schedules are the General Terms and Conditions which make uniform for all service rendered by the natural-gas company such provisions as the definition of terms, the quality and measurement of gas to be delivered, billing, payments, and delivery pressures. Also included within the tariff is the form service agreement to be executed by the natural-gas company and the purchasing companies. With such a tariff, all conditions of service, including the rates, can be readily ascertained for all purchasers from one natural-gas company.

Absent the execution of the form service agreement by the natural-gas company and a purchaser, Section 154.85 of the Commission's Regulations, made effective through Order No. 144, provides that "each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff."

When United filed its conversion tariff on July 3, 1952, its contract with Tyler Gas remained in effect as an executed

service agreement pursuant to the terms of the above-quoted regulation. Inserted in the front of the pre-existing contract there is a statement identifying the contract provisions remaining in effect and those which were superseded by the conversion tariff. This pre-existing contract statement shows that the rate terms of the contract, among other terms such as measurement of the gas, were superseded and no longer remain in effect.

By order issued July 30, 1952, the Commission accepted this revision in the course of business proposed by United and accepted by Tyler Gas, and the conversion tariff became effective as of August 3, 1952. Although Tyler Gas did file a letter of protest to the conversion tariff it did not seek review of the order permitting it to become effective and in its motion for refunds in Docket No. G-2210 asks to be returned to the tariff rates contained in the conversion tariff. It is clear, therefore, that we are not here concerned, either in the motion for refunds or in the joint petitions for rejection, with contract rates. We are here dealing with tariff rates, filed *ex parte* by United, as revised by new tariff rates also filed *ex parte* by United.

Service was rendered pursuant to the conversion tariff rates until United filed a proposed *ex parte* change in the tariff rates to Tyler Gas in Docket No. G-2210 on June 24, 1953. By order issued July 10, 1953, we permitted the rate for resale for industrial use only to take effect on July 25, 1953, subject to final determination in the proceedings as to its future effect but we suspended the rate for resale for domestic use until December 25, 1953, when it could be made effective on motion of United. This *ex parte* filing provided for rates of 20¢ per Mcf for the first block and 12.5¢ per Mcf for the second block for gas resold for domestic use and 13¢ per Mcf for gas resold for industrial use only, an overall increase in rates of approximately 70%. Tyler Gas

objected to the proposed increase and filed a petition to intervene in the proceeding.[2]

Initial hearings on the matters involved in Docket No. G-2210 were held on July 20, 1953, but were not completed before the end of the suspension period when United could move to put the rates into effect, subject to refund, in accordance with Section 4 (e) of the Act. In order to forestall the new tariff rates for resale for domestic use from going into effect subject to refund as of December 25, 1953, Tyler Gas filed a petition for injunction in the U.S. District Court for the Eastern District of Texas, Tyler Division, seeking to enjoin United from moving to put the rates into effect. The District Court denied the injunction for failure to show grounds for equitable relief (Civil No. 1662 issued January 26, 1954). Upon appeal by Tyler Gas the lower court was affirmed by the Court of Appeals for the Fifth Circuit. *Tyler Gas Service Company, et al.* v. *United Gas Pipe Line Company*, 217 F. 2d 73. When Tyler Gas did not seek *certiorari* the decision of the Fifth Circuit became final and binding upon it. Meanwhile, pursuant to our order issued January 25, 1954, the increased rates for sale of gas to Tyler Gas for resale for domestic use went into effect, subject to refund, as of December 25, 1953.

In our Opinion No. 277 issued on November 2, 1954, in Docket Nos. G-1142, G-2210, *et al.*, we determined the just and reasonable rates to be charged by United to its jurisdictional customers.[3] Tyler Gas did not contest the rate level found to be just and reasonable and, with the City of Tyler, stated on the record its acceptance of the terms of the proposed

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[2] The July 10, 1953 order consolidated the rate increase proceeding in Docket No. G-2210 with other proceedings involving the rates of United, including Docket No. G-1142 which involved a Section 5 (a) investigation into the entire rate structure of United.

[3] Opinion No. 277 accepted a settlement agreement among the parties to the proceeding as being appropriate and in the public interest.

settlement subject to the outcome of the litigation then pending before the United States Court of Appeals for the Fifth Circuit. We disallowed and denied the rate increases proposed by the *ex parte* filing of United in Docket No. G-2210 and directed the filing of new rates, to be effective as of August 1, 1954, in conformity with our findings and the settlement agreement among the parties. However, because of the pendency of the appeal by Tyler (the Court of Appeals issued its decision in the *Tyler Gas* case on November 24, 1954) we provided that the proceedings in Docket No. G-2210 should remain open for a determination of the issues raised by Tyler Gas and the City of Tyler and the rates to Tyler Gas continued subject to refund. To protect Tyler Gas from paying more than the lawful rate pending the court decision, we stayed our order in Docket No. G-2210 to the extent Tyler Gas would be required to pay more than the settlement rates applicable to it. From the date the decision of the Court of Appeals became final, the contingency provided for in Opinion No. 277 having been satisfied, the settlement rates became applicable to United's sales to Tyler Gas.[4] It is clear, therefore, that Tyler Gas was fully protected from paying more than the lawful rate pending our determination.

Tyler Gas argues that it is entitled to refunds of all amounts collected by United in excess of the conversion tariff rate for resale for domestic use of 11.2¢.[5] It seeks this result regardless of the determination of the lawful rates in Opinion No. 277. It bases its argument upon the holding

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[4] Pursuant to Opinion No. 277 the rates to Tyler Gas, effective as of August 1, 1954, were 17¢ per Mcf for the first block and 12.5¢ per Mcf for the second block for gas resold for domestic use. For gas resold for industrial use the rate was 12.5¢ per Mcf.

[5] Tyler Gas does not ask for restitution of the increase in the rate for resale for industrial use above the 7.5¢ per Mcf minimum contained in the conversion tariff.

of the Supreme Court in the *Mobile* case which was handed down subsequent to the decision of the Court of Appeals for the Fifth Circuit in the *Tyler Gas* case. But the *Mobile* case is distinguishable from the situation involved here either in Docket No. G-2210 or in the two later rate increase proceedings in Docket Nos. G-9547 and G-10592.

The *Mobile* case involved a contract rate for resale for industrial use only which United attempted to set aside by its unilateral filing. Pursuant to Section 4 (e) the rate increase was not suspended or made effective subject to refund. The Supreme Court held that a natural-gas company cannot, by a unilateral filing under Section 4 of the Act, effect a change in a contract rate. With respect to Mobile, United had filed its conversion tariff but, unlike the departure from the contract rates to Tyler Gas effected by the conversion tariff, the conversion tariff did not change the contract rate or charge to Mobile. This significant difference sets the two cases apart in fact and in law. In Mobile, the conversion tariff filing merely restated the rate from a percentage figure to a specific amount. The rate contracted for remained intact and the Court held that the rate filing in G-2210 was an abrogation of contract. But, in the *Tyler Gas* case, as the Court of Appeals for the Fifth Circuit held, the revised tariff rates proposed for the sale of gas to Tyler Gas were not violative of contract rights and were properly filed. As we have shown, prior to the filing of the conversion tariff, United received, pursuant to contract with Tyler Gas, 12¢ per Mcf for gas resold for domestic use and 80% of the proceeds of gas resold for industrial use. When the conversion tariff became effective, the rates were changed to 11.2¢ per Mcf for gas resold for domestic use and 7.5¢ per Mcf for gas resold for industrial use. Clearly, this was not just a restatement of a percentage

amount in cents per Mcf. The rate for gas resold for domestic use, which never had been stated in terms of a percentage of the amount received by Tyler Gas, was reduced 0.8¢ per Mcf. United had, in accordance with the Commission's Regulations, converted from a contract rate to an *ex parte* tariff rate. And, Tyler Gas acquiesced in this significant change in its course of business. It accepted service rendered and paid for it in adherence to the new tariff rates from the date they became effective on August 3, 1952, until an increase in the tariff rates became effective subject to refund in Docket No. G-2210.

Indeed, Tyler Gas does not now seek to return to its contract rate. It accepts the tariff rate but inconsistently argues that United has no power to file later changes of the same character. As we have shown, however, the contract rate ceased to exist on August 3, 1952. From that date, the course of business between United and Tyler Gas has been governed by *ex parte* tariff rates. Tyler Gas cannot now claim the validity of a non-existent contract provision to support one *ex parte* rate over another *ex parte* rate subsequently filed. The existence of *ex parte* tariff rates for the sale of gas to Tyler Gas having been established by the conversion tariff, changes in those rates may be filed *ex parte* without the prior agreement of the purchaser in accordance with appropriate procedure under the Act, for such a filing abrogates no contract rights. [6]

[6] Of course, the mere filing of an *ex parte* tariff rate does not constitute approval of the change by the Commission. The *ex parte* filing of a proposed change in the tariff rate in Docket No. G-2210, applicable to sales of gas to Tyler Gas for resale for domestic use, became effective only provisionally on December 25, 1953. After full hearing, in which Tyler Gas participated, we disallowed the provisional rates and, when the Court of Appeals determined the procedural issue raised by Tyler Gas, a lower rate became effective in accordance with Opinion No. 277. We also directed the filing of a lower rate for resale for industrial use only. Hearings as to the reasonableness of the rates contained in the *ex parte* filings in Docket Nos. G-9547 and G-10592 have not yet been completed.

Tyler Gas and the City of Tyler filed their joint petition for rejection of United's rate filing in Docket No. G-9547 on October 21, 1955. On September 30, 1955, United had filed revisions to its tariff rates contained in its FPC Gas Tariff, First Revised Volume No. 1, proposing a general increase in its jurisdictional city gate rates. Included among the proposed revisions of its tariff rates were United's First Revised Sheets Nos. 4 and 16, which set forth the rate for the sale of gas to Tyler Gas for resale for domestic use (United's FPC Rate Schedule DG-C—General Service for Large Volume Distributors, Central Rate Zone) and for industrial use (United's FPC Rate Schedule IND-C—Large Volume Industrial Use Only, Central Rate Zone). By these proposed revisions to its tariff rates United sought to increase its then effective rates for resale for domestic use by 2.5¢ per Mcf and for resale for industrial use only by 4.0¢ per Mcf.[7] Pursuant to Section 4 of the Act, by order issued October 26, 1955, we suspended the proposed revision in the rates so far as it related to sales for resale for domestic use (First Revised Sheet No. 4) until April 1, 1956. These rates are now in effect subject to refund upon final determination of the just and reasonable rates. By their joint petition Tyler Gas and the City of Tyler request an order rejecting the revised rates contained in First Revised Sheets Nos. 4 and 16 so far as they relate to sales to Tyler Gas.

The second joint petition, filed by Tyler Gas and the City of Tyler on June 15, 1956, asks rejection of United's latest filed revision to its tariff rates in Docket No. G-10592, so far as it relates to sales of gas to Tyler Gas. By this revision, filed on May 15, 1956, United proposes an increase in the

[7] United's *ex parte* filing in G-9547 would change the rate for resale for domestic use from 17¢ per Mcf to 19.5¢ per Mcf for the first block and from 12.5¢ per Mcf to 15¢ per Mcf for the second block. The rate for resale for industrial use would increase from 12.5¢ per Mcf to 16.5¢ per Mcf.

Docket No. G-9547 rates. Its proposed Second Revised Sheet No. 4 would increase the rate to Tyler Gas, for resale for domestic use, by 1.0¢ per Mcf and, subject to final determination by the Commission, United's proposed Second Revised Sheet No. 16 increased the rate for resale for industrial use under the IND-C rate schedule from 16.5¢ to 17.5¢ per Mcf. By order issued June 15, 1956, we suspended the effectiveness of the proposed rates for resale for domestic use until November 16, 1956, and until such further time as they may be made effective in the manner prescribed by the Natural Gas Act. We conclude that United's filings in Docket Nos. G-9547 and G-10592 are governed by the same rule which controls our action in the motion for refunds in Docket No. G-2210. They are, like the *ex parte* filings in the conversion tariff and in Docket No. G-2210, proper proposals for changes in *ex parte* tariff rates. We cannot reject the proposals in Docket Nos. G-9547 and G-10592 on the procedural ground that they attempt to change a contract rate for the contract rate has long since ceased to exist. The relief requested by Tyler Gas and the City of Tyler must be denied.

Furthermore, with respect to the motion for refunds, the decision of the Court of Appeals for the Fifth Circuit affirming the decision of the lower court bars us from taking the action requested by Tyler Gas. On appeal from the decision of the District Court Tyler Gas listed eight specifications of error which, as the Court stated, "ring the changes on what it claims is the fundamental error of the trial court." (217 F. 2d 73, at pp. 76-77). Included among the specifications of error was an attack upon the holding that United may by the simple expedient of filing a revised schedule, without a prior hearing and finding that the contract rates are unjust, unreasonable or unlawful, disregard

the contract terms fixing minimum rates. It should be re-emphasized that the District Court had found that the conversion rates had constituted a departure from the contract rates, that such conversion rates became the lawful rates, and that the contract rates upon which Tyler Gas sought equitable relief had not been in effect for a matter of several months prior to the filing of the tariff rates in Docket No. G-2210. The affirmance of the District Court decision and express approval of the "well considered and expressed views of the district judge" by the Court of Appeals in the face of the specifications of error alleged by Tyler Gas effectively dispose of all issues raised.

If we were to order the refunds requested by Tyler Gas, it would be necessary for us to find, contrary to the law of the *Tyler Gas* case, *supra*, that United's *ex parte* tariff rate in Docket No. G-2210 was improperly filed and should have been rejected. Since we are confronted by the same parties, with the same issues and the same facts on which the Court of Appeals rendered its decision, we are bound by that judicial determination. *Angel* v. *Bullington*, 330 U.S. 183; *Commissioner of Internal Revenue*, v. *Sonnen*, 333 U.S. 591. Of course, the decision in the *Mobile* case has no bearing upon the conclusive effect of the *Tyler Gas* decision by the Court of Appeals for the Fifth Circuit. *Angel* v. *Bullington*, *supra*, at p. 187.

For the reasons stated above the Commission further *finds:*

(1) United's FPC Gas Tariff, Original Volume No. 1, the conversion tariff, filed on July 3, 1952, which became effective as to the rates for sale of gas to Tyler Gas on August 3, 1952, constituted a departure from the contract rates theretofore in effect. From August

3, 1952, there has been no contract rate in effect governing the sale of gas by United to Tyler Gas.

(2) The tariff rates filed by United in Docket Nos. G-2210, G-9547 and G-10592 were properly filed pursuant to the Natural Gas Act and the Commission's Regulations issued thereunder.

(3) The motion for refunds filed by Tyler Gas on May 15, 1956, in Docket No. G-2210, and the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler, Texas, on October 21, 1955, and June 15, 1956, request action which is contrary to the provisions of the Natural Gas Act and the Commission's Regulations and which is not in the public interest. Hence, the motion and the joint petitions should be denied.

The Commission *orders*:

The motion for refunds filed by Tyler Gas on May 15, 1956, in Docket No. G-2210, and the joint petitions for rejection of United's rate filings in Docket Nos. G-9547 and G-10592 filed by Tyler Gas and the City of Tyler, Texas, on October 21, 1955, and June 15, 1956, are hereby denied.

By the Commission.

LEON M. FUQUAY,
Secretary.

Filed December 30, 1953
James R. Cooney, Clerk, U.S. Court
By Dave M. Price
Deputy

In The

United States District Court

Eastern District of Texas, Tyler Division

Civil Action No. 1662

Tyler Gas Service Company, et al,

Plaintiffs,

versus

United Gas Pipe Line Company,

Defendant.

Thomas B. Ramey, of Tyler, Texas; and Bryce Rea, Jr., of Washington, D.C.; for Plaintiff Tyler Gas Service Company.

Troy Smith, of Tyler Texas; for Plaintiff City of Tyler.

Thomas Fletcher, of Houston, Texas; for Defendant.

December 29, 1953

Memorandum: —

The two plaintiffs seek the intervention of the equitable powers of this Court to restrain the defendant from filing a contemplated pleading in a proceeding now pending before the Federal Power Commission. Tyler Gas Service Company (Tyler Gas), a corporation chartered under the laws of this State, is a local natural gas distributing company, selling at retail to the residents of Tyler, Texas. The

City of Tyler (City) is a municipal corporation likewise chartered under the laws of Texas, with a population of some 40,000 persons. United Gas Pipe Line Company (United) is a Delaware corporation engaged in the transportation and sale of natural gas in interstate commerce for resale. As such, it is a "Natural-Gas Company" within the terms of the Natural Gas Act of 1938 (15 U.S.C.A. 717, et seq.).

Tyler Gas has been purchasing its gas from United since 1940 under the terms of a written contract and several amendments thereto. United has applied to the Federal Power Commission for an increase in rates considerably in excess of those presently in force, and this controversy results from efforts of Tyler Gas and City to restrain the impending institution of such proposed rate schedule.

The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½¢ per thousand cubic feet (Mcf), for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under

serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquired the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

About July 1, 1952, United filed with the Commission a schedule of rates[1] (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff, United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would constitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with its customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

On June 24, 1953, United filed with the Commission another revision of its schedule of rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

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[1] Referred to as "conversion rates, as it served to convert United's schedule of rates from contract form to tariff form. Such a change in form was required by rules of the Commission.

Upon the filing of the new proposal, by order of July 10, 1953 the Commission set a hearing for July 20, 1953 to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, "In the Matters of United Gas Pipe Line Co.") in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until December 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4 (e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expires December 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953.

The initial hearing was held July 20, 1953, as scheduled. Some testimony was taken, and the hearing was then adjourned to be reconvened at a later date. At the present time, it has not been so reconvened. As it appears that United's entire rate structure throughout several states is at issue before the Commission, in all probability the final determination will be long delayed.

Thus plaintiffs say that, come December 25, 1953, United proposes, pursuant to said Section 4 (e), to file its motion as contemplated thereby, moving the Commission to permit the proposed schedule to go into effect; that on that date

the five-month suspension period permitted the Commission by terms of the statute will have expired; and thereafter it will have no discretion but to permit the increase. While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is argued that this will simply retain the status quo until the Commission has time to act.

Federal jurisdiction exists by reason of diversity of citizenship and amount in controversy, as alleged. Having jurisdiction as well of the parties and subject matter, I pass to the main question, whether the plaintiffs have made a case calling for the exercise of the equitable powers of the Court. The briefs which have been filed by counsel for all parties have been most helpful in the consideration of this question. They fail to disclose any authority directly in point; but from the principles which are clearly established by the authorities, I am convinced that the relief prayed for may not be granted.

It is abundantly clear that United may not by private contract fix binding long-term future rates with its customers. Such rates at all times have been and now are subject to determination and control by the Federal Power Commission, as the agency designated by the Congress to perform this function. While it is no doubt an oversimplification of the problem, for present purposes it will suffice to say that the business of United is one charged with a public interest; hence, one in its position may not by private contract for future rates collect a rate which is found to be excessive, because such would be unfair to the consumer; neither may it bind itself to rates which are determined to be confiscatory, because to permit such utility

to charge and collect rates which are confiscatory of its own property would jeopardize its ability properly to serve the public in the future (*Union Dry Goods Co.* v. *Georgia Pub. Serv. Co.*, 248 U.S. 372, and cases there cited).

Thus the rate-fixing provision of the United-Tyler Gas contract, as well as many other provisions thereof, are and always have been subject to governmental review and regulation. In those instances where the contractual provisions are at variance with the governmental regulation or with public policy, the former must yield (*Colo. Interstate Gas Co.* v. *Fed. Power Comm.*, 142 Fed. (2d) 943, aff. 324 U.S. 581, and cases there cited). In such cases, compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise to a cause of action in favor of the other, either for money damages (*Miss. Power & Light Co.* v. *Memphis Natural Gas Co.* (162 Fed. (2d) 388) or for specific performance (*Mich. Consol. Gas Co.* v. *Panhandle Pipe Line Co.*, 173 Fed. (2d) 784).

So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any suggested rate is just and reasonable — and hence lawful — is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates.

While I think it clear that the utility, despite its contract to the contrary, may apply to the appropriate governmental

agency for a review of its rate structure, it is equally clear that such utility may not, by purely unilateral action, and without pursuing the statutory method to secure review by the regulatory body, disregard its current contract rates and initiate higher ones (*Southern Util. Co.* v. *City of Palatka*, 268 U.S. 232). Plaintiffs contend that the action of United should be so characterized here, and that it should not, during the long interval while the Commission has the matter under consideration, be permitted to collect rates which the Commission has not approved, and which represent only United's own estimate of the rates which it would be just and reasonable for it to collect. The proposed schedule actually is United's "asking price", and in all probability on final determination by the Commission will be whittled down substantially. The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates. United has followed the procedure prescribed by statute to secure this review, and if it files the motion which plaintiffs allege it contemplates; and if the proposed schedule is made effective December 25, 1953, it will be pursuant to the statutory scheme (*Hope Nat. Gas Co.* v. *Fed. Power Comm.*, 196 Fed. (2d) 803). If this Court should not restrain United from taking the initial step in bringing the matter before the Commission for review, then in my opinion it should not restrain the second or successive steps provided by the statute. Section 4 of the Act clearly sets out the circumstances under which a natural-gas company may file a motion of the type here in question, and provides that when so filed "the proposed change of rate, charge, classification, or service *shall* go into effect." (Emphasis added.) It is not for this Court to add another proviso, reading "and where there is no private agreement or contract to the contrary".

Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to give adequate relief.

The fact that the so-called "contract rates" agreed upon between the parties here at all times are subject to the approval of, and to modification or change by, the Commission is illustrated by the institution of the new "conversion rates" directed by order of the Commission of July 31, 1953. While the change thus effected was not great dollar-wise, it nevertheless constituted a departure from the figures upon which the parties had agreed. Such new rates became the lawful ones by virtue of the order of the Commission mentioned above, and hence the provisions of the amended contract which purported to fix the rates for a long period of time in the future, and upon which plaintiffs base their claim for equitable relief, have not been in effect for a matter of several months. During that period when the contract rates were in fact the lawful ones, they became lawful not simply because the parties had agreed thereto. Such rates received their vitality and breath of life from the fact that the Commission permitted such contract to be filed and ordered such rates into effect until further notice. By the order which accomplished this result (plaintiffs' Exh. 19), the Commission was careful to provide that such action should not "be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate."

Adopting the view as outlined above, and by reason of my desire to file this memoranda as soon as possible, I forego the consideration of a number of other questions presented by the pleadings. Among these are certain questions raised by the presence of the City of Tyler. The plaintiffs contend that United was a party to a contract not only

with Tyler Gas, but that its telegram of February 28, 1946, its letter of April 3, 1946 to the Commission of the City of Tyler, and its conduct throughout the period during which the City was negotiating with Tyler Gas concerning a renewal of its franchise, made out a contract as well between United and the City. While I would have difficulty spelling out all the elements of a contract between United and City, undoubtedly strong elements of estoppel may be invoked by City against United. It is undisputed that City was influenced in granting the renewal franchise to Tyler Gas by the assurances from United that it would sell to Tyler Gas for a long period of time at the 12¢ rate. But I think that the presence of City here as a plaintiff does not strengthen the case against United. If it could not, by virtue of its contract with Tyler Gas, preclude its own application to the Commission for a review of its rate structure, then it could not estop itself by reason of its conduct toward the City from taking the same action.

As I view the case, it is not necessary to determine the right of the City to enter into a contract (which United questions). Neither the Federal Power Commission nor many other persons enumerated by United are indispensable parties, whose presence would be required to confer jurisdiction on the Court. Having jurisdiction, I conclude that the plaintiffs do not show grounds for equitable relief, and the action will be dismissed for that reason.

Counsel were notified December 23, 1953 of this ruling. The Clerk will file the foregoing and furnish counsel a copy thereof. This memoranda is adopted as Findings of Fact and Conclusions of Law under Rule 52.

Counsel for defendant will submit order within ten (10) days.

Done at Houston, Texas, this 29 day of December, 1953.

BEN C. CONNALLY
Judge

FILED
.....M. 1-27, 1954
James R. Cooney, Clerk, U. S. Court
By Dave M. Price
Deputy

In The

District Court of the United States

For The Eastern District of Texas
Tyler Division

Civil Action No. 1662

Tyler Gas Service Company, et al,
Plaintiffs,

vs.

United Gas Pipe Line Company,
Defendant.

ORDER

For the reasons assigned in the memorandum of the Court filed herein on December 30, 1953, containing the Court's Findings of Fact and Conclusions of Law, to which memorandum, Findings and Conclusions reference is made:

It is ORDERED, ADJUDGED and DECREED:

1.

This Court has jurisdiction of the subject matter of this cause and of the parties hereto.

2.

Neither the Federal Power Commission nor any other of the persons enumerated by the defendant are indispensable parties whose presence is requisite to jurisdiction of this Court.

3.

The application of Plaintiffs for temporary injunction is denied and this cause is herewith in all things dismissed for failure of the Bill of Complaint to state or show grounds for equitable relief.

4.

All costs in this behalf incurred are herewith taxed against Plaintiffs, for which the officers of this Court may have their several executions.

ENTERED at Houston, Texas, this the 26th day of January, 1954.

BEN C. CONNALLY
Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15034*

TYLER GAS SERVICE COMPANY and
THE CITY OF TYLER, TEXAS,
Appellants,

versus

UNITED GAS PIPE LINE COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS.

(November 24, 1954.)

Before HUTCHESON, Chief Judge, and BORAH and RIVES, Circuit Judges.

HUTCHESON, Chief Judge: Alleging that United Gas Pipe Line Company, a "Natural Gas Company", was under

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* Reported at 217 F. (2d) 73.

binding term contracts as to rates with the City of Tyler and the Tyler Gas Service Company, the operators of a system for the local distribution and sale of gas and the holder of a gas franchise from the city, and that, in violation of their express covenants, it had filed with the Federal Power Commission and was proposing, at the end of the suspension period, to put into effect a schedule of higher rates, Tyler and Tyler Gas filed this suit seeking: (1) a preliminary injunction to restrain United from putting the schedule into effect; (2) a judgment declaring the contracts to be in all things valid, subsisting, and enforcible; and (3) enjoining the defendant from proposing or making effective any rates and charges in excess thereof.

The defendant moved for a dismissal of the complaint for want of jurisdiction and for want of equity and failure to state a claim because it in effect seeks to enjoin compliance by the defendant with the provisions of the Natural Gas Act,[1] and more particularly Section 4 thereof,[2] and because it in effect bases its claim to declaratory and injunctive relief upon the theory and contention that the contracts relied on override and nullify the duties, powers, obligations and procedures imposed and conferred by the act on defendant as a natural gas company under the Act, indeed override the provisions of the Act itself. In addition, it moved for a dismissal as to the City of Tyler for the reason that

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1 15 U.S.C., Chapt. 15B, Sec. 717 to 717w.

2 "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." 15 U.S.C., Sec. 717c(d).

the city was not a party to the contracts and had no capacity to sue on or in respect of them, and filed a lengthy answer, which, because of the manner in which the case went off, it is not necessary to here set out.

The matter thereafter coming on for hearing on the application for preliminary injunction, the district judge filed a carefully worded opinion in which, summing up the facts,[3] as to which there is no serious dispute, and discuss-

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[3] "The facts, which are largely without dispute, arise in the following fashion. The original contract between United and Tyler Gas was dated November 22, 1940, and provided for a price to Tyler Gas of 22½¢ per thousand cubic feet for gas to be resold for domestic use, and for gas for resale by Tyler Gas to industrial consumers of 80% of the proceeds received by Tyler Gas from such sales. These were the rates paid from 1940 to 1946. In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler Gas's franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources, at a price less than Tyler Gas paid United and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ Mcf if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures.

ing the applicable law, he held: that federal jurisdiction existed by reason of diversity and jurisdictional amount; that United is a natural gas company subject to the act; that being such it cannot by private contract fix binding long term future rates; and that plaintiffs must, therefore, seek such relief as they may be entitled to under the statute from the commission and not from the court.

"During all of this time, United was subject to the jurisdiction of the Federal Power Commission under the terms of the Natural Gas Act. Pursuant thereto and in compliance with the rules and practices of the Commission, the amendment to the contract was filed with the Commission. That body permitted such filing and ordered such rates to become effective. By virtue thereof, these contract rates were charged and collected from 1946 until July 1, 1952.

"About July 1, 1952, United filed with the Commission a schedule of rates (not those now in issue) which modified slightly the contract rates which theretofore had been in effect. By the conversion tariff [so called because it converted United's schedule of rates from contract to tariff form as required by rules of the Commission], United requested a reduction from 12¢ to 11.2¢ per Mcf for domestic gas sold to Tyler Gas and an increase from 7.2¢ to 7.5¢ per Mcf for industrial gas.

"Tyler Gas did not consent to this change, and protested to the Commission. In its protest, it stressed the same facts relied on here, namely, that the increase would coustitute a violation of the terms of the existing contract, and that Tyler Gas was committed by its franchise to a rate schedule with the customers, predicated upon the contract rates with United, and that it would suffer irreparable injury were such rates with United increased. However, by order dated July 31, 1952, the Commission allowed the conversion tariff to become effective. No appeal or judicial review under Sec. 19 of the Act was taken from such order.

"On June 24, 1953, United filed with the Commission another revision of its schedule or rates (those here in issue). By the terms thereof, domestic gas would be sold at a price of 20¢ per Mcf, and industrial gas at a price of 13¢ per Mcf. This would constitute an increase of some 70% over and above the rates fixed by the contract amendment of 1946.

"Upon the filing of the new proposal, by order of July 10, 1953, the Commission set a hearing for July 20, 1953, to consider the lawfulness of such rates; and consolidated a number of proceedings involving United's rate structure. Both Tyler Gas and City sought and secured leave to intervene in this proceeding (Federal Power Commission Docket Nos. G-1142, G-1508, G-2019, G-2074, G-2210, 'In the Matters of United Gas Pipe Line Co.') in order to oppose such proposed increase. The effective date of such proposed rates was suspended, and the use thereof deferred, pending hearing, until Dec. 25, 1953, except insofar as same applied to industrial gas, which proposed schedule was permitted to become effective July 25, 1953. The explanation for the foregoing no doubt lies in the fact that pursuant to Section 4(e) of the Act, the Commission is empowered to suspend the operation of proposed increase in rates for sale of domestic gas, but not for a longer period than five months beyond the time when it would otherwise go into effect. This five month period expired Dec. 25, 1953. Pursuant to the same section of the Act, the Commission enjoys no such power to suspend the proposed rate for the sale of industrial gas; hence its effective date was fixed at July 25, 1953. * * *"

So holding, he denied the preliminary injunction and dismissed the bill for want of equity, and plaintiffs have appealed.

Here, while conceding that the commission on final hearing may fix reasonable rates higher than the contract fixes them, appellants insist: that unless and until the contracts sued on are set aside for some invalidity, or after a hearing before the Federal Power Commission, the contract rates are found by the commission to be unreasonable and are set aside, the contract and the rates they fix are controlling upon the parties to them; and that they may not be rendered null and ineffective by the unilateral action of United in filing with the Federal Power Commission a new schedule with higher rates.

In support of their view, that this cannot be done and that the court erred in denying the preliminary injunction and dismissing the complaint for want of equity, appellants, in eight specifications of error,[4] which ring the changes on

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4 "I. The Court erred in holding that the Defendant was not precluded by its contracts with plaintiffs from invoking the provisions of the Natural Gas Act to increase gas rates provided in such contracts, in advance of a full hearing and final determination by the Federal Power Commission;

"II. The Court erred in refusing to enjoin Defendant from taking steps permitted by the Natural Gas Act to make effective increased gas rates charged Plaintiff Tyler Gas Service Company, in advance of a full hearing and final determination by the Federal Power Commission;

"III. The Court erred in holding that the provisions in the contracts between Plaintiffs and Defendant fixing maximum rates for gas were subject to abrogation, even though no proof was made that same was in the public interest;

"IV. The Court erred in holding that the Defendant was authorized under the Natural Gas Act by unilateral action to increase gas rates charged Tyler Gas Service Company in contravention of the contracts between Plaintiffs and Defendant;

"V. The Court erred in refusing to enjoin Defendant from violating its contract with, and representation to, the City of Tyler that during a period of sixteen years Defendant would sell gas to Tyler Gas Service Company (or to the City of Tyler if it should acquire the property of said Company) at rates not in excess of stipulated maximum rates;

"VI. The Court erred in holding that by virtue of the provisions of the Natural Gas Act the Court was without power to grant the relief sought by Plaintiffs;

"VII. The Court erred in holding that only the Federal Power Commission is authorized to grant the relief sought by the Plaintiffs herein;

"VIII. The Court erred in dismissing the Complaint for failure to show grounds for equitable relief."

what it claims is the fundamental error of the trial court, attack its holding that a public utility company may, by the simple expedient of filing a revised schedule with the Federal Power Commission, without a full hearing before and a finding by the Commission that such contract rates are unjust, unreasonable, or unlawful, disregard its solemn contracts fixing maximum rates.

Moving forward under these specifications and conceding that a contract fixing utility rates is deemed to have been made subject to the sovereign power of the government to alter it under proper circumstances, appellants insisting that it is not void but only voidable, quote from Vol. 73, C.J.S., Public Utilities, §16, pages 1012-1013, where it is said:

> "Such a contract is, however, voidable only in that it can not stand against modification by competent authority; and it is obligatory on the parties until abrogated by the state, falling only when the rate is altered or a different rate is fixed."

and from 43 Am. Jur. page 639:

> "Until the legislature or other body having the right to prescribe rates to be charged by public utilities has exercised this power, the rates are subject to contract between the corporation and its patrons, and such contracts will be deemed valid by the courts, and may be enforced by an appropriate mode."

Proceeding from the premises these contentions and citations supply, appellants insist that Section 4, subd. (d) and (e) of the Natural Gas Act do not authorize a natural gas company to increase rates fixed by contract solely by its own action in filing a new schedule with the commission; that this can be done only after a full hearing and determination that the contract rates are not in the public interest because unjust, unreasonable, or unlawful.

Citing in support *Colorado Interstate Co.* v. *Federal Power Commission,* 10 Cir., (142 F(2) 943, and insisting

that nothing in Secs. 4, 4(e) and 5(a) of the Natural Gas Act is inconsistent therewith, the appellants urge upon us that the district judge erred in refusing interlocutory equitable relief and in dismissing the bill for want of equity.

We do not think so. We find ourselves, on the contrary, in agreement with the well considered and expressed views of the district judge, that the defendant, a public utility, may not by private contract fix binding long term rates either too high or too low, for if too high they would penalize the particular consumers affected, or if too low they might jeopardize the ability to serve the public and in both situations they would be the result of action in contravention, if not in defiance, of the Natural Gas Act, and in particular Section 4 thereof, and of the authority and jurisdiction of the Federal Power Commission.

Based upon these views, he thought, as we do, that the commission is empowered under and in accordance with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act.

So thinking, he rejected, as we reject, the plaintiff's view that the district court could and should grant the relief asked, (1) an injunction prohibiting United from proceeding under Section 4 of the Act, and (2) a decree in effect requiring it to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding.

By supplemental brief, appellants urge upon us that the decision and judgment of the court below, that plaintiffs could not resort to the courts for relief but were remitted to the remedies provided by and under the Natural Gas Act, was a holding in effect that the United can by purely unilateral action, disregarding indeed nullifying its current rates, initiate higher ones.

As the district judge correctly pointed out in his opinion, this is not a correct, it is an incorrect, characterization of United's action in filing its schedule. Saying, "The answer to this contention, which at first blush is an appealing one, lies in the fact that this is not a unilateral action by United in disregard of its contract rates.", the district judge correctly declared that United has but followed the procedure prescribed by Section 4 of the Act, and that when the schedule became effective at the end of the suspension period, this would be not contrary but pursuant to the statutory scheme. So pointing, he correctly held that if he could and should restrain United from taking any of the preliminary steps provided by the statute, he should, as plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the court cannot do.

Finally, attaching to their supplemental brief a copy of the opinion of the Court of Appeals for the Third Circuit, in *Mobile Gas Service Co.* v. *Federal Power Commission*, 215 F. 2d 883, 892, appellants invoke as authority for their contention below and here, the majority opinion of that court holding that, under Section 4(d) of the Act, "The commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates."

Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the views of the district judge: that "Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this court. The commission is amply empowered to give adequate relief."; and that the plaintiffs did not show grounds for equitable relief.

The judgment appealed from is AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15034

JUDGMENT.

Extract from the Minutes of November 24, 1954.

TYLER GAS SERVICE COMPANY and THE CITY OF TYLER, TEXAS,

v.

UNITED GAS PIPE LINE COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Tyler Gas Service Company and The City of Tyler, Texas, and the surety on the appeal bond herein, Saint Paul-Mercury Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

CLERK'S OFFICE:—
ATTEST:—
A TRUE COPY:—

JOHN A. FEEHAN, JR.,
Clerk, U. S. Court of Appeals,
Fifth Circuit,
By CLARA R. JAMES
Chief Deputy Clerk.

New Orleans, Louisiana
October 25th, 1955.
[SEAL]

UNITED GAS PIPE LINE COMPANY

DETAIL OF CALCULATIONS RESULTING IN REFUND ORDERED PURSUANT TO PARAGRAPH D OF THE FEDERAL POWER COMMISSION ORDER OF NOV. 2, 1954 - DOCKET G-2210
TO
TYLER GAS SERVICE COMPANY

Tyler, Texas	Amount Billed	As Recomputed under Settlement Rates: Billing Demand	8 Times Billing Demand	Billing Volumes: First Block	Second Block	Total	Revenues	Refund before Interest	Date of Receipt of Amount Billed	Days Elapsed from Date of Receipt thru Jan. 31, 1955	Interest (1)
DG-C Rate											
Date											
1953											
Dec. 25 thru Dec. 31	$ 12,923.73	19,424	35,091(2)	35,091	47,306	82,397	11,978.60	1 045.13	2-11-54	355	60.93
1954											
January	54,920.63	20,433	163,464	163,464	187,150	350,614	51 182.63	3,738.00	3- 1-54	337	207.87
February	41,811.25	20.433	163,464	163,464	64,195	227,659	35,811.26	4,997.99	4- 6-54	302	276.76
March	44,053.25	20,433	163,464	163,464	91,152	254,616	39,142.38	4,870.37	4-10-54	287	271.76
April	25,377.20	20,433	163,464	126,652		126,652	21 530.84	3,346.36	5- 1-54	275	186.35
May	24,229.40	20,433	163,464	120,308		120,308	20,452.36	1,777.04	5-28-54	218	119.35
June	18,334.00	20,433	163,464	91,422		91,422	15,541.74	2,792.26	6-23-54	193	148.69
July	17,836.00	20,433	163,464	88,810		88,810	15,097.70	2,737.30	8-20-54	158	121.09
August	18,328.80	20,433	163,464	91,278		91,278	15,517.26	2,811.54	9-27-54	127	113.70
September	18,121.00	20,433	163,464	90,303		90,303	15,351.51	2,769.49	10-26-54	98	82.62
October	26,783.20	20,433	163,464	133,755		133,755	22,738.36	4,044.84	11-23-54	69	82.55
November	40,705.18(3)	20,433	163,464	163,464	64,406	227,870	35,813.63	4,865.55	12-28-54	35	29.84
December	47,711.50	20,433	163,464	163,464	134,268	297,732	44,322.33	4,881.12	1-27-55	4	3.32
Total Thru December	$383,134.14							$48,185.00			$2,949.14

(1) $.00016438356 per dollar per day
(2) 8 x 19,424 x 7/31
(3) Includes adj. to Oct. billing - $(22.20)

Acknowledgment of Payment and Release

The undersigned hereby acknowledges receipt of the entire amount of refund of $48,185.00, and interest at 6% per annum of $1,407.40 due from United Gas Pipe Line Company under the terms, conditions and reservations set out in Opinion and Order No. 277 issued by the Federal Power Commission November 2, 1954, in F.P.C. Docket Nos. G-2210, et al, as computed in the above statement, and hereby releases United Gas Pipe Line Company from all claims and obligations under said Opinion and Order.

Tyler Gas Service Company
(Customer)

By J. W. Hudson
(Title) Pres.

Date February XX 1955

UNITED GAS PIPE LINE COMPANY

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June	18,334.00	20,433	163,464	91,422		91,422	15,541.74	2,792.26	6-23-54	193	148.69
July	17,836.00	20,433	163,464	88,810		88,810	15,097.70	2,737.30	8-20-54	158	121.09
August	18,328.80	20,433	163,464	91,278		91,278	15,517.26	2,811.54	9-27-54	127	113.70
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Tyler Gas Service Company
(Customer)

By J. W. Hudson
(Title) Pres.

Date February XX 1955

PROVISIONS OF NATURAL GAS ACT (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. 717, et seq.)

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

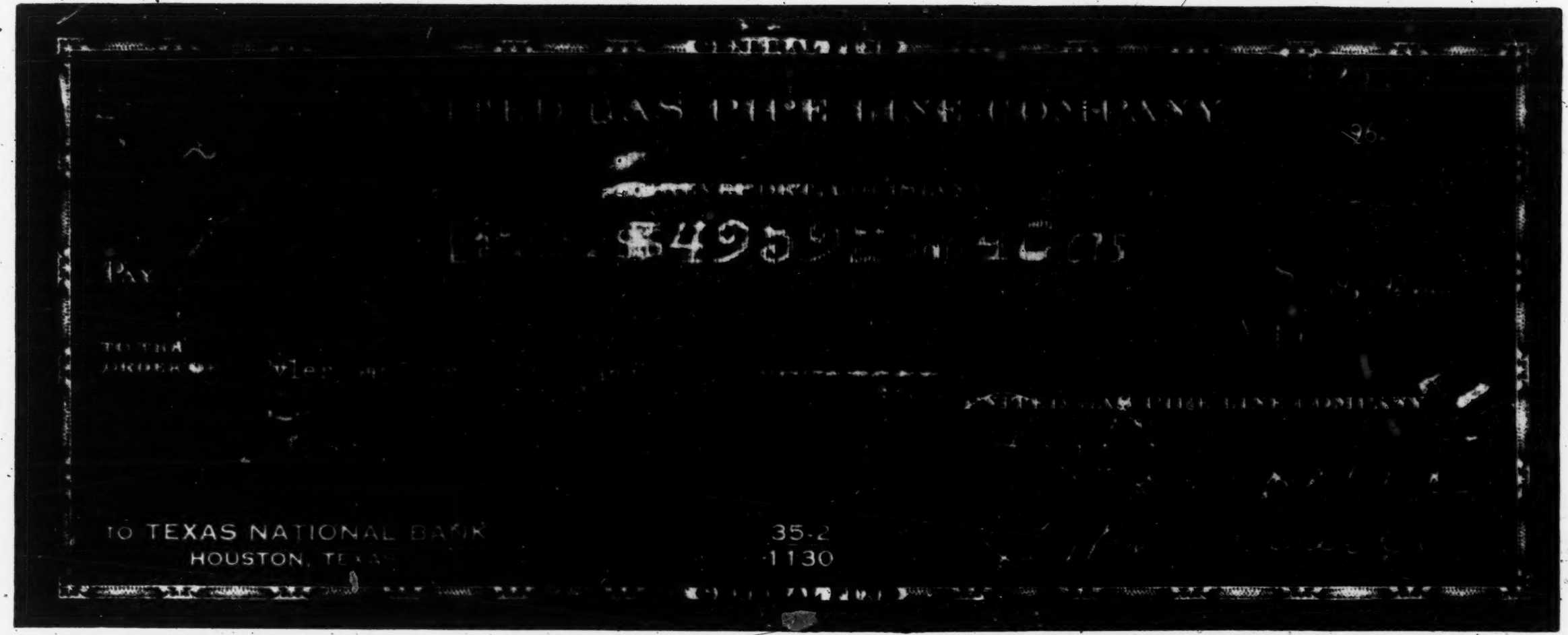
(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

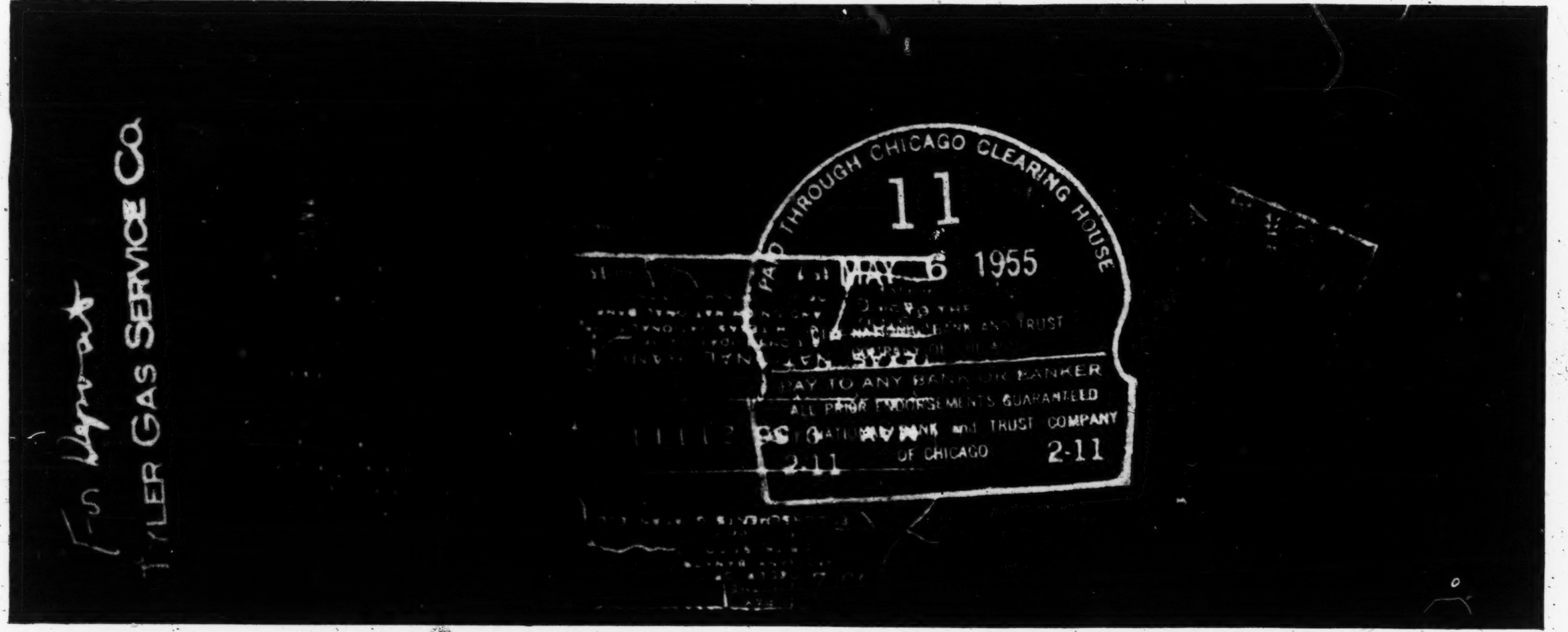
(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations,

or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the pro-




TYLER GAS SERVICE CO
PAID THROUGH CHICAGO CLEARING HOUSE
11
MAY 6 1955
PAY TO ANY BANK OR BANKER
ALL PRIOR ENDORSEMENTS GUARANTEED
OF CHICAGO
2-11
2-11

ceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. 717c (1946)]

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract

to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. 717o (1946)]

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No

objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave of adduce additonal evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its finding as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District Court of the United States for the District of Columbia,

or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this act or any rule, regulation, or order of the Commission thereunder.

(c) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interest in investigations made by it, or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission. [52 Stat. 832 (1938); 15 U.S.C. 717s (1946)]

SEC. 22. The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall

have exclusive jurisdiction of violations of this act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this act or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this act. [52 Stat. 833 (1938); 15 U.S.C. 717u (1946)]

FROM ORDER 144 OF THE FEDERAL POWER COMMISSION PROMULGATING REGULATIONS UNDER THE NATURAL GAS ACT

§154.11 Rate Schedule

The term "rate schedule" means a statement of a rate or charge for a particular classification of transportation or sale of natural gas subject to the jurisdiction of the Commission, and all terms, conditions, classifications, practices, rules and regulations affecting such rate or charge. This term also includes any contract for which special permission has been obtained in accordance with §154.52.

§154.38 Composition of Rate Schedule

The sheets of a rate schedule shall contain a statement of a rate or charge and all terms and conditions governing its application, arranged as follows:

(a) Title. Each rate schedule shall have a title consisting of a designation (see §154.34) and a statement of the type or classification of service to which it is applicable.

(b) Availability. This paragraph shall describe the conditions under which the rate is available, and, if necessary, the geographic zone in which available.

(c) Applicability and character of service. This paragraph shall fully describe the kind or classification of service to be rendered.

(d) Statement of rate. (1) Except as permitted in §§154.52 and 154.82, all rates shall be clearly stated in cents or in dollars and cents per unit. Only the rates and charges to be used in current billing shall be included in the rate schedules.

(2) A rate having more than one part shall have each part set out separately under appropriate headings such as: Demand Charge, Commodity Charge, etc. The minimum bill and other provisions affecting charges shall not be included in this paragraph, but shall be included in subsequent paragraphs.

(3) No rule, regulation, exception or condition such as tax, commodity price index, wholesale price index, purchased gas cost adjustment clauses or other similar price adjustments or periodic changes shall be included in the rate schedule or any other part of the tariff which in any way purports to effect the modification or change of any rate or charge specified in the rate schedule, or the substitution therefor of any other rate or charge: Provided, however, a natural-gas company may state in the service agreement or in rate schedules filed pursuant to §154.52 that it is or will be its privileges, under certain specified conditions, to propose to the Commission a modification, change or substitution of the then effective rate or charge: Provided, further, That no such clause may effectuate a change in an effective rate or charge except in the manner provided in §4 of the Natural Gas Act, as amended, and the regulations in this part.

(e) Minimum bill. The minimum bill heading shall appear on every rate schedule followed by the word "none" if no minimum bill is provided.

(f) Other provisions. All other major provisions governing the application of the rate schedule, such as determination of billing demand, contract demand, heat content, measurement base, shall be set forth similarly with appropriate headings, or if appropriate, they may be incorporated by reference to the applicable general terms and conditions.

(g) Applicable general terms and conditions. This paragraph shall list by reference the general terms and conditions set forth in the following section which apply to the particular rate schedule.

§154.39 General Terms and Conditions

This section shall contain provisions which apply to all or any of the rate schedules and which may more conveniently be arranged in a separate section of the tariff. Sub-

sections and paragraphs shall be numbered for convenient reference.

§154.40 Composition of Service Agreement

There shall be submitted as part of the tariff and unexecuted copy of each form of service agreement. The service agreement forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, effective date and term, and identification of any prior agreements being superseded.

§154.85 Status of Contracts Filed as Rate Schedules and Restated

Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: Provided, however, That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in effect: Provided further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 520

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, and THE FEDERAL POWER COMMISSION,

Respondents.

OBJECTION OF PETITIONER TO MOTION OF McMURREY REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND MOTION TO STRIKE THE BRIEF FILED

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November 4, 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 520

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, and THE FEDERAL POWER COMMISSION,

Respondents.

OBJECTION OF PETITIONER TO MOTION OF McMURREY REFINING COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND MOTION TO STRIKE THE BRIEF FILED

United Gas Pipe Line Company, Petitioner, objects to and opposes the motion of McMurrey Refining Company for leave to file brief amicus curiae in oppositon to petition for Writ of Certiorari and moves to strike the brief amicus curiae in oppositon attached to and under the same cover with said motion for the following grounds and reasons:

1. The Motion is insufficient for failure, as required by Rule 42(3) of this Honorable Court, to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; * * *"

On the contrary, the motion and the so-called brief attached clearly show that the requirement of the Rules cannot be met, for the motion and the brief simply adopt with approval the brief in oppositon already filed by Respondents Tyler Gas Service Company and The City of Tyler, Texas.

2. Consent by Petitioner was denied for the filing of an amicus curiae brief upon the stated grounds that Petitioner was convinced that the attorneys for Tyler Gas Service Company and The City of Tyler, Texas, were adequately and efficiently able and prepared to present all facts and questions of law relevant and necessary to, or persuasive in, the disposition of the case, including all contentions assertable by Tyler Gas Service Company and The City of Tyler, Texas.

3. The record in this case contains nothing to warrant or support the purported facts set forth in the middle paragraph of Page 2 of the Motion.

4. The sole ground of interest alleged is that McMurrey Refining Company is a customer of Tyler Gas Service Company and thus liable to have its rates increased if the rates to Tyler Gas Service Company are increased. This is the immutable consequence of utility regulation. The proper forum for the assertion of McMurrey's claims is that forum which is authorized to consider increases in rates of Tyler Gas Service Company, i.e., the City of Tyler, Texas.

If identification as a customer of Tyler Gas Service Company be ground for McMurrey's motion, then every citizen of the City of Tyler, Texas, who buys gas from Tyler Gas Service Company would be clearly entitled. Jurisdiction and decision in this Honorable Court does not hinge upon balloting.

5. The motion seeks permission to file the brief. But the brief is attached to, and under the same cover with, the motion. The apparent theory is that irrespective of permission, the Court will read the brief so that McMurrey's purpose, thus, will have been accomplished. It is not believed that this accords with the letter or spirit of the Rules.

Accordingly Petitioner prays that the motion be denied and that the brief attached be stricken.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Thomas Fletcher, Attorney for United Gas Pipe Line Company, Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served the foregoing objection and opposition to motion of McMurrey Refining Company for leave to file an amicus curiae brief in opposition to the petition for Writ of Certiorari, and motion to strike such brief, by depositing a true and correct copy thereof in the United States Mail, airmail postage prepaid, on November 4, 1957, addressed to the following:

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Department of Justice,
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IN THE

Supreme Court of the United States

No. 520

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, and FEDERAL POWER COMMISSION,
Respondents.

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

No. 520

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, and FEDERAL POWER COMMISSION,

Respondents.

REPLY BRIEF FOR PETITIONER

The opposition of Tyler Gas Service Company (Tyler Gas) and City of Tyler (Tyler) to granting the Petition is grounded on wholly untenable reasons.

1. Suggestion that the District Court and Fifth Circuit dismissed for want of jurisdiction and did not adjudge merits contrary to the plain statements of such courts.

After stating the facts (R. 122-127) the District Court stated the issue and his ultimate conclusion as follows:

> "Having jurisdiction as well of the parties and subject matter, I pass to the main question, *whether the plaintiffs have made a case* calling for the exercise of the equitable powers of the Court. • • • ; but from the principles which are clearly established by the authorities, I am convinced *that the relief prayed for may not be granted.*" (R. 127-8.) (Emphasis supplied.)

The Court then summed up its holdings (Petition 13-19) which demonstrated the basis for the ultimate conclusion that the relief sought must be denied.

Contrary to the subsequent holding of *Mobile* (350 U.S. 332), lack of force in the claim of contract rights was thus declared:

> "During that period when the contract rates were in fact the lawful ones, *they became lawful not simply because the parties had agreed thereto.* Such rates received their vitality and breath of life from the fact the Commission *permitted* such contract to be filed and *ordered* such rates into effect *until further notice.*" R. 131.) (Emphasis supplied.) (Cf. Petition 16, 3-4.)

The District Court restated at the foot of its opinion:

> "Having jurisdiction, I conclude that the plaintiffs *do not show grounds for equitable relief*, and the action will be dismissed for that reason." (R. 132.) (Emphasis supplied.)

Dismissal was not, as Respondents suggest, for want of jurisdiction or for failure to exhaust administrative remedies, but upon the express ground that Respondents (plaintiffs) demonstrated at law no right to the relief prayed for.

Before Mobile, Tyler Gas and Tyler (R. 351-2)* were in full agreement with the Fifth Circuit (R. 361) that the decision was *on the merits* and in denial of their right to recover. *After Mobile,* they embraced that decision as an escape-lung to rescue them from the sunken wreck of merits denied. Even if wrong, finality of that judgment forever

* The position of Tyler Gas and Tyler on Motion to Dismiss their appeal in the Fifth Circuit for mootness was bottomed on claimed error of the District Court in refusing their right to recover *on the merits.* Their contentions made no suggestion of dismissal for want of jurisdiction, or that the judgment was sterile, and so harmless to the merits of their claims because merely holding they had not exhausted admininstrative remedies so that there was no judicial jurisdiction (R. 351-7).

prevents Tyler Gas and Tyler from asserting to the contrary (See Petition 11, FN 9).

Angel v. *Bullington* (1947) 330 U.S. 183, is "apt", but not for Respondents (Op. Br. 19-20). *Angel* declares the issues open for decision control res judicata arising therefrom (p. 187). It illustrates (p. 189), here paraphrased:

> "Bullington [Respondents] sought a deficiency judgment [enforcement by mandatory injunction of contract rights to prevent change in contract provisions and rates by any action or regulation initiated or permitted under the Natural Gas Act]. Angel [United] by demurrer [motion to dismiss for failure to state a claim and answer on the merits] resisted on the ground that a * * * statute precluded a deficiency judgment" [that non-existence of the asserted contract was res judicata, thus no contract to enforce by mandatory injunction; and that in any event, in the face of the Act, the design of its operation and regulation, the rights and duties of United, the "contract" was rendered inoperative and unenforceable and Respondents' claim was in defiance of Section 4 of the Act.]

The Court held Respondents not entitled to recover — an effective judgment for United.

It was open to Respondents, as to Bullington, to seek review in this Court, for the Fifth Circuit, like the North Carolina Supreme Court, was an intermediate tribunal. Accepting the judgment of an intermediate tribunal by choosing not to assert rights of review, concluded Respondents' rights, as Bullington's, "as effectively as though he [they] had proceeded through the highest tribunal available to him [them]". That the adjudication of the District Court and the Fifth Circuit "may have been erroneous is immaterial for purposes of res judicata. * * * A higher court would be available for an authoritative adjudication * * *" (p. 187).

Brownell v. *Chase National Bank* (1956) 352 U.S. 36, approved *Angel* and brought it up to date. We repeat (Petition 20): *Mobile* removed the Fifth Circuit decision from the authority of stare decisis but not from the compulsion of res judicata.

2. Courts adjudged merits, not exhaustion of administrative remedies.

Respondents suggest that that failure to exhaust administrative remedies only was adjudged by the Fifth Circuit (Op. Br. 13, 16-18).

This assertion by Respondents is in the teeth of the District Court and Fifth Circuit decisions. We have shown (Point 1, infra, Petition 12-18) that such decisions were on the merits.

Having held (1) that the "contract" gave rise to no such rights as Respondents claimed, and (2) that the "contract" was superseded and no longer in effect: the District Court then noted and accepted this admission and assurance of Respondents:

> "While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is urged that this will simply retain the status quo until the Commission has time to act." (R. 127.)

The Third Circuit emphasized the effect of this admission (215 F. 2d 885, Fn. 3).

Thus, the residual matter was the justness and reasonableness of the filed increased rates — a legislative area statutorily given to exclusive Commission decision. This impelled the District Court and the Fifth Circuit to the

statements quoted at pages 16 and 17 (Op. Br.). Such, too, is the procedural distinction noted by this Court (350 U.S. 346). The Fifth Circuit, having agreed with the District Court that the contract was inert, concluded, upon the assumptions expressed (217 F. 2d 78), no conflict existed with the Third Circuit on the procedural question. But on the primary substantive questions (Petition, 13-17), the Fifth Circuit was at categorical pains to frame the fundamental conflict it drew with the Third Circuit decision in *Mobile* (215 F. 2d 883), respecting the effect, rights, and duties of Section 4 of the Act upon private contract rates.

CONCLUSION

For reasons set forth in the Petition, it is urged that a Writ of Certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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FILED
OCT 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 320

UNITED GAS PIPE LINE COMPANY, *Petitioner*

v.

TYLER GAS SERVICE COMPANY and CITY OF TYLER, TEXAS, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 520

UNITED GAS PIPE LINE COMPANY, *Petitioner*

v.

TYLER GAS SERVICE COMPANY and CITY OF TYLER, TEXAS, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

COUNTER STATEMENT OF QUESTIONS PRESENTED

Does a judgment of one United States Court of Appeals affirming an order of a United States District Court dismissing for failure to state grounds for equitable relief a complaint for injunction alleging that a rate filing by a natural gas company violates contracts, the ground of the dismissal being that the Federal Power Commission is empowered to give adequate relief, bar another United States Court of Appeals from

finding, on review of an order of the Federal Power Commission, that the natural gas company's rate filing does violate contracts?

COUNTER STATEMENT OF THE CASE

The Dealings Between Respondents and United

From November 22, 1940 until May 10, 1946 United[1] sold gas to Tyler Gas under a contract and amendments thereto duly filed with the Commission under Section 4(c) of the Natural Gas Act. That contract fixed a flat rate of 22.5¢ per MCF for gas resold for domestic use and a rate for gas resold for industrial use of 80% of the proceeds received by Tyler Gas from such sales, but not less than 16¢ per MCF.

On May 10, 1946 the contract was amended to reduce the rate for domestic gas to 12¢ per MCF and the rate for industrial gas to 80% of the proceeds received by Tyler Gas from sales of industrial gas, but not less than 7.2¢ per MCF. As so amended the contract makes no provisions for changes in rates during its term, which runs to July 25, 1962. This amendment was duly filed with the Commission under Section 4(c) of the Natural Gas Act. The circumstances surrounding this amendment are well summed up in the Memorandum Opinion and Findings of Fact and Conclusions of Law rendered on December 29, 1953, by the United States District Court for the Eastern District of Texas in *Tyler Gas Service Company and*

[1] Throughout this Brief Petitioner may be called United, Respondents Tyler Gas and City, the Federal Power Commission the Commission, the Court of Appeals for the District of Columbia Circuit the D. C. Circuit, the Court of Appeals for the Fifth Circuit the Fifth Circuit and the District Court for the Eastern District of Texas the District Court.

City of Tyler v. *United Gas Pipe Line Company*, Civil No. 1662, as follows (Record 123-125):

"In 1946, the franchise which had been granted to Tyler Gas by City expired. At that time, natural gas was in abundant supply in the vicinity of the City of Tyler by reason of the proximity of a number of producing fields. As the expiration of Tyler's Gas franchise neared, a group of citizens approached the City Commission with the proposal that the franchise of Tyler Gas be not renewed; that a new distributing company be organized, which would procure its gas from new sources at a price less than Tyler Gas paid United; and that greatly reduced rates thus might be made available to the consumers. The City Commission was quite receptive to this suggestion and for a period of several months had it under serious consideration. Tyler Gas, of course, desired to have its franchise renewed, and United was anxious to retain this market for its product. After considerable haggling over price, and being fully conversant with these facts, United consented to reduce its price to Tyler Gas of gas for domestic consumption from 22½¢ to 12¢ MCF if City would renew the Tyler Gas franchise. A proposed new franchise for Tyler Gas was prepared, specifying the rates it would charge its consumers. These proposed rates were predicated on a rate of 12¢ from United to Tyler Gas for domestic gas and 80% of the amount received by Tyler Gas, though in no event less than 7.2¢ for industrial gas. The franchise provided further that under certain contingencies the City might take over and acquire the property and distributing system of Tyler Gas. In an abundance of caution and before approving such franchise, bottomed as it was on the proposed reduction in rates from United to Tyler Gas, the City Council requested of United that United commit itself in writing to such proposal. Pursuant

thereto, on April 3, 1946, United addressed a letter to City wherein United agreed to the proposed rates to be charged Tyler Gas; agreed that such rates would be the maximum rates which United would charge Tyler Gas for a period of sixteen years (subject only to increase in the event of imposition of certain taxes, not material here); and agreed that in the event City exercised its right to acquire the properties of Tyler Gas, then United would thereafter sell to City on the same basis and pursuant to the same contractual provisions. In reliance thereon, the proponents of the new and competing company withdrew the application for franchise, the City renewed the franchise of Tyler Gas for a period approximating the life of the contract, and the original contract of 1940 between United and Tyler Gas was amended, whereby the new rates were fixed at the agreed figures."

United Files Its Conversion Tariff in Compliance With the Commission's Order

On October 30, 1948 the Commission issued Order No. 144 in Docket No. R-107. This order, now Section 154.81 et seq. of the Commission's Regulations under the Natural Gas Act, required natural gas companies to convert their percentage rates to specific dollars and cents rates and to restate them as such by a date certain. After unsuccessfully contesting the validity of this order before the Commission and in the D. C. Circuit United finally, on July 3, 1952, filed a so-called conversion tariff in compliance with it. This tariff contained rate schedules proposed to be made applicable to sales to Tyler Gas for domestic use "where Buyer has executed with Seller a Service Agreement," (Record 21) and to sales to Tyler Gas for industrial use by McMurrey Refining Company

"where Buyer has executed with Seller a Service Agreement for service under this Rate Schedule." (Record 22) The tariff also contained the so-called Standard Service Agreements to which the above quoted portion of the rate schedules made reference.

The Effect of the Conversion Tariff on Tyler Gas

United's conversion tariff for Tyler Gas fixed a flat rate of 7.5¢ per MCF for gas for industrial use by McMurrey Refining Company in lieu of the contract percentage rate with its 7.2¢ per MCF minimum. For domestic gas the conversion tariff fixed a flat rate of 11.2¢ per MCF, .8¢ per MCF below the contract rate. At the same time the conversion tariff made the domestic rate applicable to all industrial gas other than that for McMurrey Refining Company. Under the contract all industrial gas was purchased at the industrial percentage rate. The net effect of the substitution of the conversion rates for the contract rates was to increase slightly the total cost of gas to Tyler Gas.[2]

Upon the filing of the conversion tariff Tyler Gas wrote a letter to the Commission objecting to it. (Record 307-310) The Commission took no notice of this letter, but, on August 1, 1952, issued an order allowing the conversion tariff to become effective on August 3,

[2] There is no evidence in the Record upon which the D. C. Circuit and the Commission acted respecting the effect of the conversion tariff on the cost of gas to Tyler Gas. Discussing this, the D. C. Circuit said (App. to Pet. for Cert. 6): "There is some disagreement between the parties as to the amount of the higher cost under the conversion tariff. Tyler Gas tells us it was a difference of $2,600.88, or 1%, while respondent claims the difference was $7,900.00, or 3%. The data to determine which figure, if either, is correct is not before us, even if we were interested in computing the difference."

1952. Tyler Gas never executed the Standard Service Agreements referred to in the conversion rate schedules proposed to be made applicable to it. However, although those rate schedules made the execution of the Standard Service Agreements a condition precedent to their applicability, domestic and industrial gas was nevertheless in fact sold by United and bought by Tyler Gas at the rates set forth in those schedules from August 3, 1952, until after United's rate filings in Docket G-2210 on June 24, 1953.

The Proceedings in Commission Docket G-2210

On June 24, 1953, in Docket No. G-2210, United filed with the Commission under Section 4(d) of the Natural Gas Act proposed increases in both its domestic and industrial rates to Tyler Gas. Respondents intervened in Docket No. G-2210, challenging the filing on the grounds that it violated their contracts with United, that the increased rates were unjust and unreasonable, and that United's sales to Tyler Gas were in intra-state commerce and therefore beyond the jurisdiction of the Commission. (Record 72-73)

The proposed increases in industrial rates were made effective July 25, 1953. The proposed increases in domestic rates were suspended by the Commission pursuant to Section 4(e) of the Natural Gas Act for the maximum statutory period of five months. (Record 67-71) They became effective December 25, 1953, under an order lifting suspension issued January 25, 1954. That order required United to refund with interest at 6% any portion of the increases subsequently found unjustified.

Hearings in Docket G-2210 were commenced but never concluded. Rather, conferences among United,

the Commission's Staff and various intervenors were held. These resulted in a partial settlement of the issues in Docket No. G-2210, which settlement was agreed to by all of the parties except Tyler Gas, Tyler City and Mississippi River Fuel Corporation and approved by the Commission in Opinion and Order No. 277, issued November 2, 1954. (Record 77-102) Throughout the settlement conferences Respondents stood on their challenges to United's right to abrogate the contract rate and to the justness and reasonableness of United's filing in Docket No. G-2210. They therefore accepted the rates fixed by the settlement only conditionally, subject to the subsequent determination of the issues raised in their interventions.

The Commission took cognizance of the position of Respondents in its Opinion and Order No. 277. Paragraph (C) thereof provided that the settlement rates be collected from Tyler Gas under bond subject to refund until further orders of the Commission. (Record 97-98) Paragraph (O) provided that the proceedings in Docket G-2210 remain open for the purpose of "determining the matters involved and issues presented by the petitions to intervene of Tyler Gas and Tyler." (Record 101)

Respondents Vainly Seek Judicial Relief

In the meantime, on December 8, 1953, after it had become evident that the issues raised by Respondents in Docket G-2210 would not be determined by the Commission before the period of suspension expired on December 25, 1953, and United made its domestic rate increases effective, Respondents invoked the diversity jurisdiction of the United States District Court for the Eastern District of Texas in a suit

for (1) a preliminary injunction to restrain United from making the suspended rates effective, and (2) a judgment declaring the contracts between Petitioners and United valid, subsisting and enforceable and enjoining United from violating them. United filed motions to dismiss Respondents' complaint in the District Court on the grounds that the court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted.

A hearing on the request for a preliminary injunction was held by the District Court on December 14, 1953. On December 23, 1953 the District Court issued a memorandum opinion not only denying the preliminary injunction, which was the subject of the hearing, but also granting United's motion to dismiss the complaint for the reason that United had urged, i.e., that the Commission had exclusive authority to determine the issues raised in the complaint and was "amply empowered to give [Respondents] adequate relief." (Record 131). On December 30, 1953, the District Court entered its order dismissing the cause in all things "for failure of the Bill of Complaint to state or show grounds for equitable relief." (Record 133-134) The United States Court of Appeals for the Fifth Circuit affirmed this order on the grounds " . . . that the commission is empowered under and in accord with the terms of the Act to afford relief and that any relief due the plaintiff must be sought from the commission and under and in accordance with the Act." *Tyler Gas Service Company and City of Tyler, Texas* v. *United Gas Pipe Line Company*, 217 F. 2d 73, 77.

Respondents File Their Motion for Refund With the Commission

No further action was taken by Respondents, United or the Commission respecting the issues raised by Respondents in Docket No. G-2210 until after the decisions of this Court on February 27, 1956 in *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, and *Federal Power Commission* v. *Sierra Pacific Power Company*, 350 U. S. 348, 76 S. Ct. 368. Thereafter, on May 15, 1956, Tyler Gas filed with the Commission a Motion for Refund of the amounts United had been collecting under bond subject to refund pursuant to the order of the Commission of January 25, 1954 and the further order in Paragraph (C) of Opinion and Order No. 277. (Record 97-98)

The Proceedings in Commission Docket Nos. G-9547 and G-10592

On September 30, 1955, in Docket G-9547, and on May 15, 1956, in Docket G-10592 United filed further general increases in its rates, including increases in its rates for gas purchased by Tyler Gas for re-sale for both domestic and industrial use. In each docket Tyler Gas and City filed a joint petition with the Commission for an order rejecting the filing on the ground that it was in violation of valid and subsisting contracts between Tyler Gas and United and between City and United and therefore illegal.

The Commission's Opinion and Order No. 294

The Commission heard oral argument on the Motion in Docket No. G-2210 and the Petitions in Docket Nos. G-9547 and G-10592 together on July 13, 1956. (Rec-

ord 494-570) On October 2, 1956 it issued Opinion and Order No. 294. The Order denied the Motion and both Petitions. (Record 571-580) Briefly, the Opinion stated that United's so-called conversion tariff, filed on July 3, 1952 in compliance with the Commission's Order No. 144, which required the restatement of rates in dollars and cents per unit, became effective to govern the rates for sales of gas to Tyler Gas on August 3, 1952, and that since the latter date there has been no contract rate in effect governing sales by United to Tyler Gas. The Opinion further stated that the decision of the United States Court of Appeals for the Fifth Circuit, 217 F. 2d 73, affirming the decision of the United States District Court dismissing Respondents' suit for injunction for want of a right to relief in a court of equity, barred the granting of the Motion for Refund in Docket No. G-2210.

The Opinion and Judgment of the D. C. Circuit

Respondents, having sought and been denied rehearing of Opinion and Order 294, filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. United intervened, filed briefs and argued orally to the Court. On August 1, 1957 the Court rendered its opinion and judgment. It held that this case was not distinguishable from the *Mobile* Case, that Respondents were entitled to the relief they sought from the Commission, and that the judgment of the Fifth Circuit did not bar the Commission from granting Respondents that relief.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Reasons Advanced by Petitioner

Review on writ of certiorari by this Court is "not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons therefor." (Rule 19(1)) The "special and important reasons" Petitioner advances for the granting of certiorari here are that the D. C. Circuit, "without being empowered thereto, exercised a revisory power over the Fifth Circuit decision, appellate in character," and, in addition, refused to adhere to the principle of *res judicata*. (Pet. for Cert. 10, 11)

The infirmity in these contentions is that the D. C. Circuit *did not* "revise" the judgment of the Fifth Circuit and *did not* refuse to adhere to the principle of *res judicata*. On the contrary, it proceeded upon the assumption that the defense of *res judicata* could properly be pleaded by United and properly be considered by the Commission. Its holding was that the principle of *res judicata* was not correctly applied by the Commission to bar the relief Respondents sought. In short, it simply held that the judgment of the Fifth Circuit was not an adjudication that Respondents were not entitled to the relief they sought, but rather an adjudication that they could not get the relief they sought except by recourse to the Commission.

Thus, even if we assume that the D. C. Circuit erred, the error is in the application of the principle of *res judicata* in the facts of a particular case. Such error, unlike error in the definition or delimitation of the principle itself, is not a sufficient reason for the exercise by this Court of its discretion to review on writ

of certiorari. Compare *In Re Woods*, 143 U. S. 202 with *Angel* v. *Bullington*, 330 U. S. 183.

The Decision of the D. C. Circuit That the Rule of the Mobile Case Is Applicable Is Correct

It is not altogether clear from the Petition for a Writ of Certiorari whether Petitioner challenges the holding of the D. C. Circuit that the rule of the *Mobile* Case forbids United from making unilateral changes in its contract with Tyler Gas and that the Commission erroneously permitted it to do so in this case. However, in any event, as the D. C. Circuit held, this case is on all fours with the *Mobile* Case. As United itself argued to this Court in its Petition for Certiorari in that case, p. 15, fn. 15, Tyler Gas is in "precisely the same situation" as Mobile.

Here as in *Mobile* United sells gas under a long-term contract that fixed rates and that made no provision for rate changes during its term. Here as in *Mobile* United, during the term of the contract, filed a so-called conversion tariff in compliance with the Commission's Order No. 144. Indeed the conversion filings were made at the same time in the same proceeding—Docket No. G-2019. Here as in *Mobile* the conversion tariff changed the contract rates. Here as in *Mobile* the conversion tariff was accompanied by a statement identifying the terms of the contract that were not changed, which statement did not identify the rate terms as unchanged. Here as in *Mobile* gas was bought and paid for at the conversion rates from the date the Commission permitted them to take effect—the same date in both cases. Here as in *Mobile* United thereafter filed increased rates under Section 4(e) of the Natural Gas Act. Here as in *Mobile* Respondents

challenged the legality of the increased rate filings on the ground that they violated the contract. The D. C. Circuit therefore correctly held that there was "no sound basis in fact or principle to distinguish this case from *Mobile*." (App. to Pet. for Cert. 8)

The Judgment of the Fifth Circuit Is Not Res Judicata

The judgments in the Fifth Circuit upon which United relies to support its plea of *res judicata* did not go to the merits of Respondents' claims. Both the District Court and the Court of Appeals held only that Respondents had administrative remedies available, had failed to exhaust them, and that the doctrine of primary administrative jurisdiction precluded resort to the Courts except by way of review of administrative action. This is perfectly clear from both the findings of fact and conclusions of law and judgment of the District Court, and from the opinion of the Court of Appeals affirming the judgment. The District Court "Ordered, Adjudged and Decreed: The application of Plaintiffs for temporary injunction is denied and this cause is herewith in all things dismissed for failure of the Bill of Complaint to state or show grounds for equitable relief." (Record 133-134) It is to be noted that *the Court dismissed the bill of complaint. It did not render judgment for the defendant.*

This disposition of the case is highly significant in view of the pleadings. United's Answer to the Complaint of Respondents was accompanied, as permitted by Rule 12(b) of the Federal Rules of Civil Procedure, by a motion to dismiss for lack of jurisdiction and a motion to dismiss for failure to state a claim upon which relief could be granted. The basis of both

motions was that Respondents were in the wrong forum, i. e., that their case belonged in the Federal Power Commission and not in the District Court. Both motions, to clinch their argument, conceded that in the Commission Respondents had a right to have their claims adjudicated on the merits. Thus, in its motion to dismiss for lack of jurisdiction United said:

> "the granting of an injunction would be for this Honorable Court to substitute its judgment . . . for the exclusive discretion of the administrative agency to whose sole authority and jurisdiction the Natural Gas Act commits all such matters, *including the propriety of the very matters sought to be enjoined here.* (Emphasis supplied) (Record 274)
>
> "said complaint shows on its face that all of the subject matter of this suit is now properly and validly pending before the Federal Power Commission in Docket G-2210; . . . that [plaintiffs] are parties to said cause, and that all of the matters, facts and issues sought to be submitted here have already been submitted by the Plaintiffs to the Federal Power Commission *which is competent at the law to hear and determine the matters posed by the Plaintiffs and to determine whether they constitute the basis of any right to relief*, and that said hearing is in course and is not completed." (Emphasis supplied) (Record 281)

In its motion to dismiss for failure to state a claim upon which relief could be granted United said:

> "(1) Said complaint shows upon its face that Plaintiffs have intervened in and are now active parties to Docket G-2210, . . . and that said Plaintiffs are thus empowered to adduce any evidence in their possession on the question of the right and justification to the Defendant to the increase

sought, *including the force and effect, if any, of the contentions made herein based upon the contract between Defendant and Tyler Gas Service Company.*" (Emphasis supplied) (Record 282)

Having thus challenged by motions to dismiss the authority of the District Court to entertain the Complaint, United then proceeded to answer the Complaint on the merits. The Answer admitted some facts and denied others. Specifically, it denied that it was not abiding by the terms of any existing contract with Tyler Gas, denied that it had any contract with City, and denied that "the matters relied on in the bill of complaint as constituting part of" said contract were a contract "which the parties were able legally and validly to make." (Record 300)

Thus United joined two broad issues. It challenged the right of the Court to entertain the cause on its merits by motion to dismiss. It challenged the existence and validity of the contracts with Respondents by answer, its challenge of the validity being on the same ground as its unsuccessful challenge of the contract held valid by the Supreme Court in the *Mobile* Case, *supra*. How did the District Court dispose of the case with the issues thus joined? It disposed of the case on the first issue by granting United's motion to dismiss the complaint for failure to state a claim upon which relief could be granted.

It did not determine the second issue, much less dispose of the case on that issue. This is perfectly clear, for had it done so it would have rendered judgment either for the plaintiff or for the defendant. Under the Federal Rules of Civil Procedure if the court sustains defenses required to be raised by answer

it grants judgment for the defendant. It does not dismiss the complaint. Rule 12, Rule 56. United's defense denying the existence and validity of the contracts which were the basis of Respondents' Complaint was of course one that could not be raised by a motion to dismiss. Rule 12(b) of the Federal Rules of Civil Procedure.

In short the District Court dismissed the Complaint, not because it was without merit as alleged in United's Answer, but because, as alleged in United's motion to dismiss, it failed to state a cause of action cognizable in a court of equity. The Court's Memorandum, which it adopted as its findings of fact and conclusions of law, makes it plain that, in the Court's view, the reason the Complaint failed to state a cause of action cognizable in a court of equity was that:

> "Any relief to which plaintiffs may be entitled in the premises must be secured through action of the Commission and not of this Court. The Commission is amply empowered to give adequate relief." (Record 130)

The Court of Appeals affirmed the District Court's dismissal of the complaint on the ground that Petitioner "is empowered under and in accordance with the terms of the [Natural Gas] Act to afford relief and that any relief due the plaintiff must be sought" from the Commission. 217 F. 2d 73, 74. It did not hold that contract rates could be abrogated by a unilateral filing under Section 4 of the Act. This is obvious from the fact that the Court discussed the *Mobile* Case in its opinion, accurately stated the holding of the Court of Appeals for the Third Circuit in said case and concluded that:

> "Assuming, without deciding, that the opinion of the majority is right, that of Judge Hastie, the dissenting member, is wrong, we think it plain that the opinion does not conflict with, that indeed it supports and confirms, the view of the district judge: that 'Any relief to which plaintiff may be entitled in the premises must be secured through action of the commission and not of this Court: The commission is amply empowered to give adequate relief'; and that the plaintiffs did not show grounds for equitable relief." (217 F. 2d at p. 78)

Undoubtedly, from the foregoing statement, the Fifth Circuit makes it clear that its opinion and the opinion and judgment of the District Court were not in conflict with the Third Circuit in the *Mobile* Case. Certainly, if the opinion of the Fifth Circuit had been based upon the conclusion that the contract between United and Tyler Gas had been abrogated by the filing of United's conversion tariff it would have been incumbent upon it either to assert affirmatively that it did not agree with the Third Circuit in the *Mobile* Case or to reverse the judgment of the District Court. Having done neither, it is obvious that the Fifth Circuit merely concluded, as the opinion recites, that "Any relief to which plaintiff may be entitled in the premises must be secured through action of the Commission and not of this Court," and nothing more.

In the face of all of this the only rational interpretation of the opinion and judgment of the Fifth Circuit is that it decided only that Respondents were in the wrong forum. Any other interpretation requires the absurd conclusion that the United States Court of Appeals for the Fifth Circuit in the *Tyler* Case held precisely contrary to the United States Court of

Appeals for the Third Circuit in the *Mobile* Case and at the same time relied upon that case to support its holding.

The fact that both the District Court and the Fifth Circuit discussed in their opinions the question of United's right to file rate increases with the Commission is immaterial. Contrary to United's argument, it is highly doubtful that Respondents could have successfully sought a writ of certiorari from this Court for the purpose of securing an adjudication of that question. In the *Mobile* Case this Court, in alluding to the decision of the Fifth Circuit in the *Tyler* Case, noted that the basis for the decision there was strictly procedural. This Court, 350 U. S. at page 346, said: "The Court of Appeals for the Fifth Circuit, *although distinguishing its decision on a procedural ground*, has indicated a contrary conclusion." (Emphasis supplied) Indications of conclusions will not support judicial review. *Black v. Cutter Laboratories*, 351 U. S. 292. In that case the Supreme Court dismissed a writ of certiorari to the Supreme Court of California on the ground that the decision involved no substantial federal question. The petitioner had argued that the opinion of the Supreme Court of California contained statements establishing rules of law violative of the Constitution of the United States. The answer of this Court was that it "reviews judgments, not statements in opinion." 351 U. S. at p. 297. *A fortiori* statements in opinions or indications of conclusions will not support a plea of *res judicata*.

United makes much of the fact that the District Court found that it had jurisdiction of the subject

matter and the parties. This is true but beside the point. The Court had jurisdiction of the subject matter because there was diversity of citizenship. It had jurisdiction of the parties because there was legal service of the complaint upon United. It therefore had power to decide whether the complaint stated a cause of action which it could adjudicate. Finding that it did not, the Court properly ordered dismissal, not for lack of jurisdiction, but, in the parlance of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U. S. 246, 249.

So too, United's reliance on the fact that the Fifth Circuit denied its motion to dismiss Respondents' appeal as moot is misplaced. United emphasizes that the Court denied that motion on the ground that the District Court had not only denied a preliminary injunction but had entered a final order "determining the case on the merits." (Record 361; Pet. for Cert. 12, 13) But the question is the merits of what. The answer is the merits of Respondents' claim that the District Court had authority to grant them relief.

Angel v. *Bullington*, 330 U. S. 183, is apt here. That was a suit following foreclosure of a mortgage for a deficiency judgment in a United States District Court in North Carolina, the jurisdiction of the Court being laid on diversity of citizenship. Prior to that suit the Supreme Court of North Carolina had dismissed a suit on the same cause of action on the ground that a statute of North Carolina barred all suits by mortgagees for deficiency judgments. This Court held that the judgment of the Supreme Court of North Carolina barred the subsequent suit in a United States District

Court in North Carolina. It reasoned that a United States District Court exercising diversity jurisdiction was a court of North Carolina; that the Supreme Court of North Carolina had held that all of the courts of the State were closed to the suit; and that that holding, having been made in the face of a claim that the State lacked power under the United States Constitution so to close its courts, could not be re-litigated. In answer to the argument that the Supreme Court of North Carolina had not adjudicated the merits of the controversy the Supreme Court said that the issue was whether all of the courts of North Carolina were closed and that the merits of that issue had been adjudicated.

Applying the rule of the *Angel* Case here, the issue adjudicated in the Fifth Circuit was the right of Respondents to judicial relief without prior resort to the Federal Power Commission. The Court denied that right. Its judgment to that effect concededly bars a subsequent suit on the same cause of action without prior resort to the Commission. But that is all it bars. It obviously cannot bar proceedings in the Commission on the issue of the legality of United's rate filing, since the whole thrust of the judgment was that the Commission had authority to determine that issue in the first instance while the Court did not.

The situation here is exactly the one distinguished by this Court in the *Angel* Case at 350 U. S. p. 190, i.e.,

where a decision is based "on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court." In that situation a judgment declining to exercise jurisdiction is not a bar to a suit in a court that has jurisdiction. Here the Court of Appeals for the Fifth Circuit held that the Congressional distribution of power among the various tribunals of the United States required Respondents to prosecute their claims initially in the Federal Power Commission rather than in a federal court. Obviously a judgment that the Court has no authority to determine the merits of a claim but that only an administrative agency has such authority cannot bar the determination of the merits by the administrative agency.

In sum United's position comes to this. Having blown hot in the Fifth Circuit it blew cold before the Commission. Having once eaten its cake it tried to have it again. This the D. C. Circuit properly held it could not be permitted to do. It could not be permitted to defeat Respondents in court on the ground that they had a remedy in the Commission and then defeat them in the Commission on the ground that they lost in court. To use the Court's own words, "[w]e cannot see how a decision that a party must seek relief before an administrative agency can be *res judicata* of the merits of the agency's later denial of the relief requested." (App. to Pet. for Cert. 9)

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 520

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

TYLER GAS SERVICE COMPANY and CITY OF TYLER, TEXAS,
Respondents.

MOTION OF McMURREY REFINING COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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McMurrey Refining Company (McMurrey), pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully moves for leave to file the brief *amicus curiae* annexed hereto in opposition to the petition of United Gas Pipe Line Company (United) for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The interest and reason for participation of McMurrey are as follows:

McMurrey is a corporation organized under the laws of the State of Texas and is engaged in the business of refining crude oil in the City of Tyler, County of Smith, Texas. In the course of its business, McMurrey purchases gas from Respondent Tyler Gas Service Company (Tyler)

pursuant to a contract. The rate fixed by said contract is one cent per MCF above the cost of the said gas to Tyler. Tyler in turn purchases such gas from United under a contract which, as modified, provides for a rate of 7.5¢ per MCF.

Since 1953 United has three times filed schedules with the Federal Power Commission (the Commission) purporting to increase the rates provided for in its contract with Tyler without Tyler's consent. The effect of these increases, if valid, is to increase the cost of gas purchased by McMurrey by over 135%. For example, the cost to McMurrey of the gas purchased by it during the twelve months' period from February 1, 1956 to January 31, 1957 at the contract rate is $134,626.60. At the increased rate the cost is $318,815.44, or an increase of $184,188.84 per year.

The United States Court of Appeals for the District of Columbia Circuit has set aside an order of the Commission holding that United had the legal right to increase the contract rates without Tyler's consent. This is a proceeding to review that Court's judgment. Thus McMurrey is vitally and directly interested in the outcome of this cause and was permitted to file a brief *amicus curiae* and to participate in oral argument in the Court below.

Respectfully submitted,

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October 29, 1957.

IN THE

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UNITED GAS PIPE LINE COMPANY,

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The interest of McMurrey Refining Company (McMurrey) in this cause is set forth in McMurrey's motion to which this brief is annexed.

Argument

The sole question raised by the petition for certiorari is whether the United States Court of Appeals for the District of Columbia Circuit erroneously held that a decision of the Court of Appeals for the Fifth Circuit dismissing Respondents' complaint for lack of juris-

sdiction did not constitute *res judicata* as to the merits of Respondents' claims before the Federal Power Commission and therefore does not bar Respondent Tyler Gas Service Company from recovering sums erroneously collected from it in violation of a contract. It is respectfully submitted that such an issue raises no such substantial question of law as to merit review by this Court.

Moreover, it is respectfully submitted that it is so crystal clear from the opinion of the Court below, as well as from Respondents' brief in opposition, that the decision relied on by Petitioner as constituting *res judicata* was not a decision on the merits here that it seems unnecessary to add further argument.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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October 29, 1957.